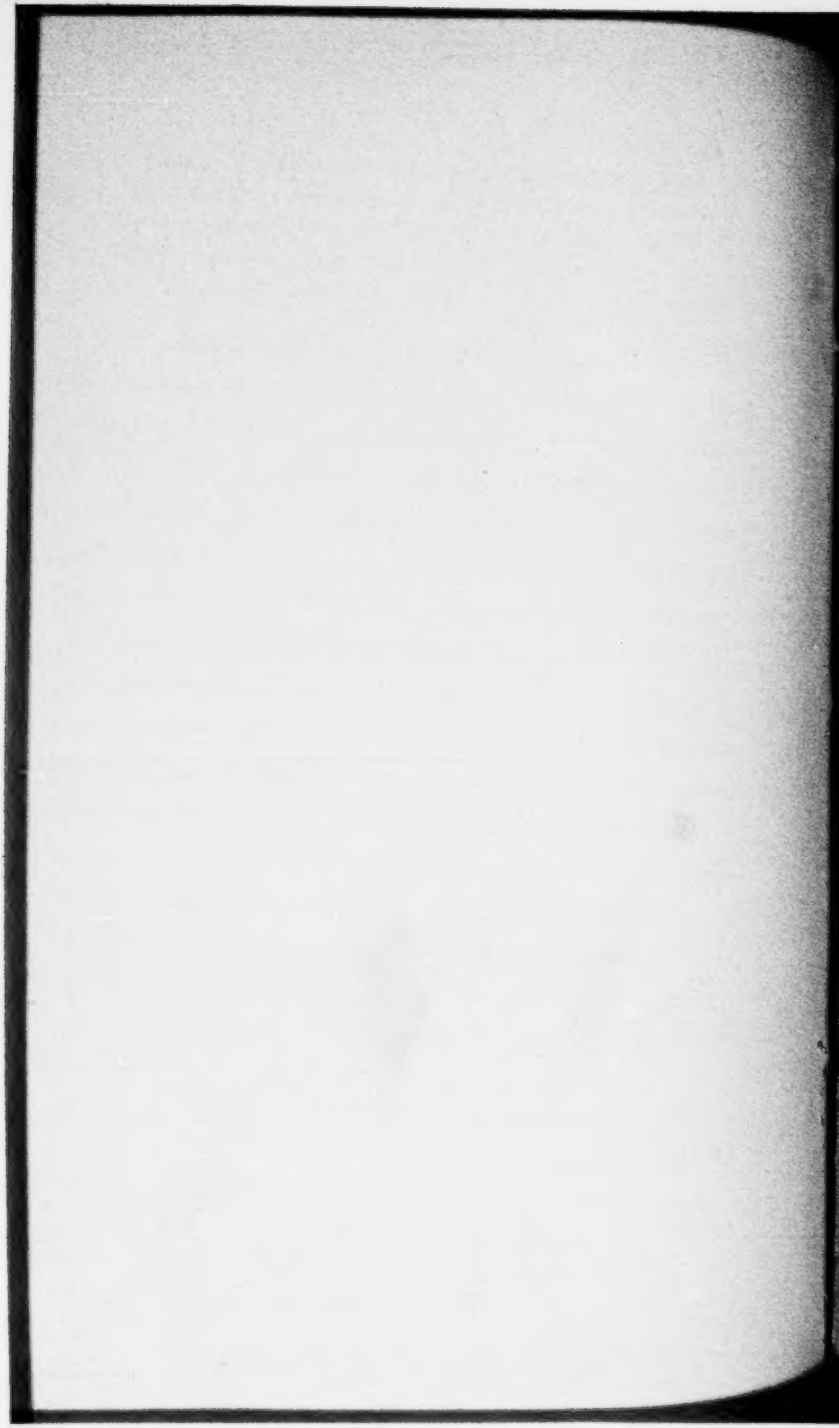

Supreme Court of the United S

OCTOBER TERM, 1902.

IN EQUITY.

THE STATE OF SOUTH DAKOTA, *Complainant*,

vs.

THE STATE OF NORTH CAROLINA, CHARLES SALTER AND SIMON ROTHSCHILDS, *Defendants.*

BRIEF FOR THE STATE OF NORTH CAROLINA.

ROBERT D. GILMER, *Attorney-General*,

JAMES E. SHEPHERD,
JAMES H. MERRIMON,

GEORGE ROUNTREE, *of Counsel.*

IN THE

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against

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BRIEF FOR THE STATE OF NORTH CAROLINA.

STATEMENT OF THE CASE.

This is a suit brought by the complainant, the State of South Dakota, against the State of North Carolina and others, for the purpose of having an accounting of and adjudicating the indebtedness upon all the bonds of the State of North Carolina of the class held by South Dakota; all the bonds having a first lien on the stock of the State of North Carolina in the North Carolina Railroad Company, and to foreclose the liens upon the State's stock in the said railroad company for the purpose of paying complainant and all others holding bonds secured by such liens.

The State of North Carolina owns stock in the North Carolina Railroad Company of the par value of three millions

of dollars. There are outstanding bonds, known as the first mortgage bonds, with a lien upon said stock, amounting to the par value of about two million seven hundred and twenty-three thousand dollars. The bonds held by the State of South Dakota were of the class issued under and by virtue of an act of the General Assembly of North Carolina, entitled "An act to incorporate the Western North Carolina Railroad Company," ratified the 15th day of February, 1855, and of an act amendatory thereof, ratified the 19th day of December, 1866, entitled "An act to enhance the value of the bonds to be issued for the completion of the Western North Carolina Railroad, and for other purposes," and amounted to about two million five hundred thousand ($2,500,000) dollars, and, by their terms, fell due on July 1, 1897.

At the time these bonds were authorized and issued, no stock certificates had been issued to the State of North Carolina for her stock in the North Carolina Railroad Company, nor have any certificates ever been delivered, or set apart, or marked as mortgaged or pledged, as required by the Act of 1866.

The lien, if any, by which the bonds held by the complainant State is secured is a second mortgage lien upon the stock owned by the State of North Carolina in said railroad company.

The defendant Charles Salter is the owner of a few of the bonds of the same class as those held by the complainant, and is made defendant as representative of the private bondholders.

The defendant Simon Rothschilds is the owner of a few of the bonds secured by the first mortgage upon the State's stock in said railroad company, and is made defendant as representa-

tive of that class of bondholders who are all, so far as known, private individuals.

In 1879, the defendant, the State of North Carolina, being overwhelmed with debt, and unable to pay the interest thereon and the current expenses of the government, passed an act appointing commissioners to adjust and compromise the State debt. This was done to a large extent, and of the two million five hundred thousand ($2,500,000) dollars of bonded indebtedness similar to that held by the complainant, all but about two hundred and fifty bonds of the par value of two hundred and fifty thousand ($250,000) dollars were compromised and settled. Practically all bonds not compromised were owned, or controlled, by Simon Schafer and his brother Samuel Schafer, composing the partnership and firm of Schafer Bros., brokers, of New York City. Schafer Bros. having tried in vain, by petition to the General Assembly of North Carolina and otherwise, to secure better terms in the settlement of their bonds than those upon which the others were settled, Simon Schafer, acting through Congressman Burke, of South Dakota, made a donation of ten out of the two hundred and fifty of the bonds held and controlled by him and his brother to the State of South Dakota. He had no interest, personal or pecuniary, in said State. The assignment or transfer was made on the 21st day of September, 1901, after the maturity of the bonds, and almost immediately thereafter this suit was brought, without any demand upon or notice to the authorities of the State of North Carolina.

The defendant, the State of North Carolina, through her

counsel, did not demur to the complaint, but answered, and, in the answer, solemnly protests against the exercise of jurisdiction by this Court in this cause, and also sets up a defence upon the merits.

We will first discuss the question of jurisdiction, and then the merits.

ARGUMENT.

The Court is without jurisdiction to make any decree against the defendant, the State of North Carolina, in this cause.

It is settled law that a sovereign can not be sued in the Courts without his consent.

Belknap v. Schild, 161 U. S., 10.
The Siren, 7 Wallace, 152.
Smith v. Weguelin, L. R. 8 Eq., 198 (1869).
Briggs v. Light Boats, 11 Allen, 157.

And this rule applies to suits brought in the Federal Courts against either of the States of this Union.

Beers v. Ark., 20 How., 527, 529.
New Hampshire v. Louisiana, 108 U. S., 76.
Cunningham v. M. & B. R. R., 109 U. S., 446, 451.
Hans v. Louisiana, 134 U. S., 1.
Louisiana v. Texas, 176 U. S., 1.

It is insisted, however, that the defendant has consented to be sued in this cause, and that in two ways:

(1) By pleading to the merits.

(2) Under the terms of the Constitution, by becoming a member of this Union of States.

I.

The State of North Carolina did not consent to the exercise of jurisdiction in this cause by pleading to the merits.

Whatever may be adjudged to be the legal effect of the answer on this point, it is manifest from a reading thereof that there was no intention on the part of the representatives of the State of North Carolina to consent to this suit, but rather to show to the Court fully the purpose and object thereof as good ground for a refusal to entertain jurisdiction. The answer is a protest against the exercise of jurisdiction, and an attempt to show that the action is a cunningly devised scheme to evade the letter of the prohibition of the Eleventh Amendment, while accomplishing a result plainly forbidden by it.

While it is a general rule that want of jurisdiction as to the parties is waived by voluntary appearance or a failure to object at the proper time (cases collected in *12 Enc. of Plead. and Prac.*, page 191); this is not true of a want of jurisdiction as to the subject matter (*Ibid*, pages 127, 188, *et seq.*).

That the Court will carefully consider and decide whether it has jurisdiction, though the point was not raised until the hearing, was affirmed by Lord Hardwicke in *Penn v. Lord Baltimore*, 1 Versey, Sr., 444, 447, and Mr. Justice Iredell said, in his opinion in *Chisholm's case*, 2 Dall., 429, that although the State voluntarily appeared, it would have been the duty of the Court to carefully consider, before giving judgment, whether it had jurisdiction.

This is especially true of original suits between sovereign

States in the Supreme Court; the Court will not assume jurisdiction unless it plainly exists; and the objection may be taken at any time.

In *Rhode Island v. Massachusetts,* 12 Peters, 657, after bill, plea and answer, Mr. Webster made a motion to dismiss the action for want of jurisdiction, and the Court entertained the motion, but, upon consideration, held that it had jurisdiction of the cause; whereupon Mr. Webster, on account of the reference in the opinion to the voluntary appearance of the State, moved the Court for leave to withdraw the plea filed on behalf of the defendant, and also the appearance theretofore entered for the State of Massachusetts. The Court said that the appearance and plea did not affect its decision on the point of jurisdiction, and overruled the motion.

Rhode Island v. Massachusetts, supra, at page 759.

In the recent case of *Minn. v. Hitchcock,* 185 U. S., 373, it is held that:

> "Neither the silence of counsel nor the express consent of the parties will justify the Supreme Court of the United States in ignoring the question whether it has original jurisdiction of a suit commenced therein."

Apparently, there was bill, answer and proof in *New Hampshire v. Louisiana,* 108 U. S., 76, and yet the Court dismissed the cause for want of jurisdiction.

It is conceded that this Court has jurisdiction of the parties, provided it be such a "controversy between two or more States" as is contemplated in the grant of judicial power by Art. III, sec. 2, of the Constitution.

If the facts show the suit to be such a "controversy," the failure to demur is immaterial—the demurrer would have been overruled; if it be not such a "controversy," the objection may be taken at any time, because the Court has no jurisdiction of the subject matter.

Equity Rule 29.
1 Foster's Fed. Prac., pages 241, 249, 535, 536.
53 Fed. Rep., 18.

Besides, Art. IV, sec. 9, of the Constitution of North Carolina is as follows:

> "The Supreme Court shall have original jurisdiction to hear claims against the State, but its decision shall be merely recommendatory, no process in the nature of execution shall issue thereon; they shall be reported to the next session of the General Assembly for its action."

Under this provision of the Constitution, it has been held that the only authority *competent to give consent for the State of North Carolina to be sued* is the General Assembly.

Moody v. State Prison, 128 N. C., 12.

And this has never been done.

And even if a State had consented to be sued, the consent could be withdrawn at any time, as it has been by the protest of the State.

Beers v. Arkansas, 20 How., 527.
Mighell v. Sultan of Johore, (1894) 1 Q. B., 149.
Judgment of Lord Esher.

II.

The State of North Carolina did not consent to be sued in a cause like this by becoming a member the United States and subscribing to the Constitution. The present suit is not such a "controversy between two or more States" as was contemplated by the Constitution of the United States.

The complainant argues that this cause comes within the words of grant of judicial power to this Court; that it is a "controversy between two or more States," and also between "a State and citizens of other States," and is of a civil nature.

But it is clear that this is not conclusive.

There are many cases in which this Court has decided against the jurisdiction which seemed to come within the words of the Constitution.

In *Ky. v. Dennison*, 24 Howard, 66, the Court declared it to be the duty of the State of Ohio, or its Governor, to deliver up to Kentucky a fugitive slave, but declined to give judgment on the ground that it had no means of compelling obedience to its decrees.

In *Miss. v. Johnson*, 4 Wallace, 475, and in *Georgia v. Stanton*, 6 Wallace, 50, the Court declined to entertain the cause and to give judgment, because it was an attempt to induce the Court to interfere in political matters.

See also:

New Hampshire v. Louisiana, 108 U. S., 76.

Wisconsin v. Pelican Insurance Co., 127 U. S., 265. 287.

Hans v. Louisiana, 134 U. S., 1.

Louisiana v. Texas, 176 U. S., 1.

The grant was of "judicial power," hence, controversies not properly subject, according to the accepted principles of jurisprudence, to judicial determination, were not included.

In *Louisiana v. Texas*, 176 U. S., 1, on page 18, Chief Justice Fuller said:

> "As might be expected in view of the nature of the jurisdiction, the cases are few in which the aid of the Court has been sought in controversies between two or more States."

The word "controversies" is not defined in the Constitution, but *all* controversies were not intended, says Bancroft, because the word "all," which had been used in the preceding grants, was dropped here and purposely.

> *2d Bancroft's History of the Constitution*, pages 199, 200.
> *R. I. v. Mass.*, 12 Peters, 721.

The controversies intended by the framers of the Constitution were naturally akin to those with which they had become familiar from the experience of the colonies, such as those growing out of claims for soil, territory, jurisdiction and boundary.

In *U. S. v. Texas*, 143 U. S., 621-639, Justice Harlan says:

> "At the time of the adoption of the Constitution, there existed, as this Court said in Rhode Island v. Massachusetts, 12 Peters, 657, 723, 724, controversies between eleven States, in respect to boundaries, which had continued from the first settlement of the colonies. The necessity for the creation of some tribunal for the settlement of these *and like controversies* that might arise, under the new government to be formed, must,

> therefore, have been perceived by the framers of the Constitution, and, consequently, among the controversies to which the judicial power of the United States was extended by the Constitution, we find those between two or more States."

Story, in his Commentary on the Constitution (1833), sections 1674-1675, says:

> 1674: "Before the adoption of this instrument, as well as afterwards, very irritating and vexatious controversies existed between several of the States in respect to soil, jurisdiction and boundary, and threatened the most severe public mischiefs." * * *
>
> 1675: "Before the Revolution, controversies between the colonies, concerning the extent of their rights of soil, territory, jurisdiction and boundary, under their respective charters, were heard and determined before the King and Council, who exercised original jurisdiction therein, upon the principle of feudal sovereignty. * * * The same necessity which gave rise to it in our colonial state, must continue to operate through all future time. Some tribunal exercising such authority is essential to prevent an appeal to the sword and a dissolution of the government."

And while the language of the Constitution was not intended to be strictly limited to these subjects, the genesis of the clause, as given in the opinion of the Chief Justice in *Louisiana v. Texas,* 176 U. S., 13, would seem to show that it was intended to restrict the jurisdiction to disputes *arising directly between States,* and not to assumed quarrels.

This view is strengthened by the fact that there is manifested in the Constitution a purpose to prevent the possibility of disputes arising between States by giving to Congress con-

trol over interstate commerce and other matters which would naturally lead to friction, even going so far as to prohibit compacts and agreements between States, except by and with the consent of Congress.

Bancroft says, *History of the Constitution*, pages 212, 213:

> "In framing the Constitution, Madison kept in mind that the functions of the general government should extend to the prevention of 'trespasses of the States on the rights of each other.'"

Hamilton, in the eightieth number of the Federalist, after arguing from history that the power of determining causes between the States was essential to the peace of the Union, says (page 534):

> "But there are many other sources, besides interfering claims of boundary, from which bickerings and animosities may spring up among members of the Union. * * * Whatever practices may have a tendency to disturb the harmony between the States, are proper objects of Federal superintendence and control."

The last sentence seems to give a clue to the solution of the question as to the kind of controversies contemplated by the Convention. They must arise between the contending States and grow out of State action deemed to be immediately and directly prejudicial to the complaining State,—action which would, or might, become a cause of war, if the States were independent nations.

And the decisions of this Court, in this class of cases, tend to confirm this view.

Indeed, with the exception of the recent cases of *Missouri v. Illinois,* 180 U. S., 208, and *Kansas v. Colorado,* 185 U. S., 125, the Court is believed to have entertained jurisdiction in interstate suits only in cases of unascertained boundary and jurisdiction. In *Missouri v. Illinois,* upon demurrer to the bill, the Court held that it had jurisdiction to restrain the State of Illinois from emptying the sewerage of Chicago into the Mississippi River, because it was, or might be, an immediate injury to the State of Missouri, which could be redressed in no other way than by the action of the public—the State; (*Harvard Law Review,* vol. 15, page 68); and in *Kansas v. Colorado,* that it had jurisdiction to restrain the diversion of the waters of the Colorado River to the irreparable injury of the whole State of Kansas.

In each of these cases the controversy arose directly between the contending States, and was not factitious—made by the voluntary action of the complaining State by assuming a controversy already existing and with which it had no proper concern.

It is not difficult to believe that practices such as were complained of in *Missouri v. Illinois,* and *Kansas v. Colorado,* as well as the cases of disputed boundary, might lead to war between independent nations; but surely there was no absolute necessity in order to prevent an "appeal to the sword" for a tribunal to collect ordinary debts; loans due by a State to private individuals, and which they, being unable to collect, voluntarily assign to another State, *especially when the citizens of such other State have all the remedies of citizens of the debtor*

State. States do not ordinarily maintain the quarrels of their citizens, certainly not the citizens of other States, for failure to pay debts, much less go to war for them.

While writers on international law differ somewhat among themselves, many of those of greatest authority say that it is the practice of nations, when petitioned by their citizens, to intervene for the enforcement of obligations due by other nations to them, to make a distinction between such obligations as are contractual—loans voluntarily entered into with a knowledge of all the risks and the inability of collection by suit—and such as are tortious.

They generally refuse to interfere for the collection of debts, but do, for the redress of other kinds of grievances.

> *1 Halleck International Law,* 435, and note.
> *W. E. Hall International Law* (3d Edition), 277.
> *New Hampshire v. Louisiana,* 108 U. S., 76.

And such has been the practice of England and the United States. To show the practice of the United States, the following citations from *Wharton's Digest of International Law,* section 231, are made:

> "With regard to the contracts of an individual born in one country with the government of another, most especially when the individual contracting is domiciliated in the country with whose government he contracts, and formed the contracts voluntarily, for his own private emolument, and without the privity of the nation under whose protection he has been born, he has no claim whatsoever to call upon the government of his nativity to espouse his claim, this government having

no right to compel that with which he voluntarily contracted to the performance of that contract."

"Mr. J. Q. Adams, Secretary of State, to Mr. Salmon, April 29, 1823, 5 Am. St. Pap. (For. Rel.), 403."

* * * * * * * * *

"It is not usual for this government to interfere except by its good offices for the prosecution of claims founded on contracts with foreign governments."

"Mr. Calhoun, Secretary of State, to Mr. Crump, May 28, 1844."

* * * * * * * * *

"The claimants in this case stand in the relation of parties to a contract into which they voluntarily entered with the government of Brazil, against which they now seek indemnity for losses sustained, resulting, as it is said, from acts of that government alleged to be in contravention of their contract. It is a well established rule of this government that in such cases the parties are remitted for the redress of injuries resulting from any breach or disregard of the contract to the laws of the country in which the agreement was entered into, and where it is to be performed. This rule, so far as known, is one generally recognized by other civilized powers."

"Mr. Fish, Secretary of State, to Mr. Pratt, July 17, 1875, MSS. Dom. Let."

To show the practice of Great Britain, we quote the reply of Lord Derby, Foreign Secretary, to a committee of British merchants, page 35:

"If it were understood that the English creditor of defaulting foreign States might rely upon English arms to enforce the contract, why need he take thought regarding the security on which he lends his money? He would have the advantage when the credit of the

borrowing State was not the best, of high interest, and would be sure, if anything went wrong, that English power would be employed to set him right. He would thus be put in a better position than the creditors of England herself, who must be satisfied with three per cent. When the foreign loans which the commission inquired about were contracted, there was no understanding that, in case of default, the government would go to the rescue of the creditors; for, in that event, the loans would have been obtained on better terms. Where would be the justice of suddenly altering the conditions of the contract by intruding the force of British diplomacy upon the field?

"How could it be right to impose burdens on the nation to save the people from the evil which is the result of their own imprudence and greed of high interest? Would it be at all fair to make all classes of the community pay to help those people who, with their eyes open, risked their money because the profit was far above what usually attends a safe investment?"

British Quarterly Review, Jan., 1876, page 54.

Such also was the policy announced by Mr. Balfour in the House of Commons on December 15, 1902, in the debate on the Venezuelan question.

But it is understood that the contention of complainant's counsel is that this suit is brought in vindication of its property rights, and there are several cases in which this Court has entertained original bills to protect the proprietary rights of a State against injury or infringement by *individuals*, such as

Georgia v. Brailsford, 2 Dal., 402.

Pennsylvania v. Wheeling Bridge Company, 13 How., 618.

Texas v. White, 7 Wall., 700.
Florida v. Anderson, 91 U. S., 667.
Alabama v. Burr, 115 U. S., 413.

We submit, however, that the fact that the suit is brought in vindication of the property rights of the complaining State is also not conclusive. This Court, we believe, has never pronounced final judgment in such an action; and there are at least two cases in which it has declined to entertain such jurisdiction.

New Hampshire v. Louisiana, 108 U. S., 76.
Wisconsin v. Pelican Insurance Co., 127 U. S., 265.

In both of these cases, we submit, property rights were involved; but the Court declined jurisdiction on account of the nature of the title and the method and purpose of its acquirement.

In *New Hampshire v. Louisiana,* the suit was on bonds of the defendant State which had been assigned to the complainant State, which had the legal title and the right to collect and receipt for the same, when, according to general principles of law, the validity of the assignment was not open to question by the debtor State.

Walker v. Bradford Old Bank, 12 (1883-84) Q. B. D., 511.

But the Court declined jurisdiction, because it was an attempt to evade the prohibition of the Eleventh Amendment by using the State as a collecting agent, which we think is being attempted in the present suit, with more boldness but not more ingenuity.

In *Wisconsin v. Pelican Insurance Company* the State of Wisconsin owned a judgment, which it had obtained against the Pelican Insurance Company, and a judgment is such property as a State may sue to protect. (*Georgia v. Brailsford,* 2 Dal., 402.) But when the State of Wisconsin brought suit on this judgment in this Court, jurisdiction was declined because the judgment was obtained on a cause of action, which, under the settled principles of public law, the Courts of no other jurisdiction would enforce—it was a judgment for a penalty.

Whether the subject matter of a "controversy between two or more States" is included within the grant of judicial power of this Court must be determined not only by the language of the Constitution but also by the decisions of the Court and historical considerations.

Shiras, J., in *Mo. v. Ill.,* 180 U. S., 219.

In Chisholm v. Georgia, Justice Iredell had earnestly insisted that, by the grant of "judicial power," it was not intended to give new and unheard of remedies, but the language would have to be construed with reference to antecedent remedies, well known to common law (2 Dallas, 437), and that by the common law an action of assumpsit would not lie against the sovereign.

In *Wisconsin v. Pelican Insurance Co.,* Mr. Justice Gray said, at pages 287, 289:

> "Notwithstanding the comprehensive words of the Constitution, the *mere fact that a State is the plaintiff* is not a conclusive test that the controversy is one in

which this Court is authorized to grant relief against another State or her citizens. * * *

"The object of vesting in the Courts of the United States jurisdiction of suits by one State against the citizens of another was to enable such controversies to be determined by a national tribunal, and thereby to avoid the partiality, or suspicion of partiality, which might exist if the plaintiff State were compelled to resort to the Courts of the State of which the defendants were citizens. Federalist, No. 80; Chief Justice Jay, in Chisholm v. Georgia, 2 Dall., 419, 475; Story on the Constitution, secs. 1638, 1682. The grant is of 'judicial power' and was not intended to confer upon the Courts of the United States jurisdiction of a suit or prosecution by the one State, of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other State at all."

In *Hans v. Louisiana,* 134 U. S., 1, 15, Mr. Justice Brad ley, speaking for the Court, said:

"The truth is, that the cognizance of suits and actions unknown to the law and forbidden by the law was not contemplated by the Constitution when establishing the judicial power of the United States. Some things, undoubtedly, were made justiciable which were not known as such at the common law; such, for example, as controversies between States as to boundary lines, and other questions admitting of judiciary solution. And yet the case of *Penn v. Lord Baltimore,* 1 Ves. Sen., 444, shows that some of these unusual subjects of litigation were not unknown to the Courts even in colonial times, and several cases of the same general character arose under the Articles of Confederation, and were brought before the tribunal provided for that purpose in those articles. 131 U. S. App., 1. The establishment of this new branch of jurisdiction seemed to be neces-

sary from the extinguishment of diplomatic relations between the States. Of other controversies between a State and another State or its citizens, which, on the settled principles of public law, are not subjects of judicial cognizance, this Court has often declined to take jurisdiction. (See *Wisconsin v. Pelican Insurance Co.*, 127 U. S., 265, 288, 289, and cases there cited."

Query: Is it not questionable whether anything was made justiciable by the Constitution that was not such before? Was it not rather an extension of jurisdiction over parties previously not subject to judicial action rather than an extension of judicial power over subject matters which were previously beyond the competency of the Courts to deal with?

But however that be, and, in addition to the fact that the pleadings and proof show that the controversy is factitious—the result of elaborate contrivance, more or less participated in by complainant—and not one arising directly between the two States and growing out of their public relations and intercourse—not one in which the States of South Dakota and North Carolina are in direct antagonism as States—we insist that there are special reasons why this Court should not entertain jurisdiction of such an action.

I. A State is not liable to suit upon its bonds, either by an individual or another State.

II. If a suit can be brought upon the bonds of a State by another State, no such suit can be brought upon bonds voluntarily transferred to the State merely because the holder of them cannot collect them.

III. If suits can be brought against a State upon bond so assigned to another State, the present suit cannot be maintained, because it is a suit by the State of South Dakota AND Charles Salter, representing all individual bondholders of the same class, against the State of North Carolina.

We will discuss these propositions seriatim.

I. A State is not liable to suit upon its bonds, either by an individual or another State.

There seems to be no doubt that suits against States for the collection of debts were unheard of at the time of the adoption of the Constitution and the power to bring them would not have been included if the proposition had been made.

In *Bank of Washington v. Ark.*, 20 Howard, 530, 532, Mr. Chief Justice Taney, delivering the opinion of the Court, said:

> "Those who deal in the bonds and obligations of a sovereign State are aware that they must rely altogether on the sense of justice and good faith of the State; and that the judiciary of the State can not interfere to enforce these contracts without the consent of the State, and the Courts of the United States are expressly prohibited from exercising such a jurisdiction."

Mr. Webster, in his opinion given to Baring Bros. & Co., October 16, 1839, Works, Volume 6, 537, 539, said:

> "The security for State loans is the plighted faith of the State as a political community. It rests on the same basis as other contracts with established gov-

ernments, the same basis, for example, as loans made by the United States under the authority of Congress; that is to say, the good faith of the government making the loan, and its ability to fulfill its engagements."

These expressions of the law, among others, were cited with approval by Mr. Justice Bradley in *Hans v. La.*, 134 U. S., 1. 12-17.

In *Briscow v. Bank of Kentucky*, 11 Peters, 257, 321, Mr. Justice McLean, delivering the opinion of the Court, said:

"No sovereign State is liable to be sued without her consent. Under the Articles of Confederation, a State could be sued only in cases of boundary. It is believed that there is no case where a suit has been brought at any time, on bills of credit against a State, *and it is certain that no suit could have been maintained on this ground prior to the Constitution.*"

In *Crouch v. Credit Foncier*, 8 Court of Q. B., (1872-'73,) 374, 384, Mr. Justice Blackburn said:

"Foreign and colonial governments frequently create a public debt, the title to portions of which is made to depend on the possession of bonds expressed to be payable to the bearer or holders. There can hardly be said properly to be any right of action on such instruments at all, though the holder has a claim on the government."

Hamilton, in his Report in 1795, Annals of Congress 1793-'95, 3 Congress, page 1635, said:

"Public debt can scarcely, in legal phrase, be defined either as property in possession or in action. It is evidently not the first till it is reduced to possession by payment. To be the second, would suppose

> a legal power to compel payment by suit. Does such a power exist? The true definition is, a property subsisting in the faith of the government. Its essence is promise. Its definite value depends upon the reliance that the promise will be definitely fulfilled."

We may assume, then, that suits for the collection of State debts were unknown at the time of the adoption of the Constitution, and were not contemplated by the framers of that instrument or the States which adopted it, and, judging from the earnestness with which the leading champions of the Constitution, such as Hamilton, Madison and Marshall, labored to show that States were not liable to be sued on their debts, and the difficulty of securing its ratification in such States as Virginia and New York, in spite of such assurances, and the indignation caused by the decision in *Chisholm's case*, we may be sure that such a provision would not have been accepted if it had been proposed, and, according to the opinion of Mr. Justice Bradley, in *Hans v. Louisiana*, quoted above, such suits as were not contemplated by the framers of the Constitution are not included in the grant of "judicial power."

The view that what was not contemplated by the framers of the Constitution is not included in the grant of judicial power is also advanced by Campbell, Justice, in his dissenting opinion in *Florida v. Georgia*, 17 Howard, 513, and apparently is adopted by Chief Justice Marshall as a test for the decision of the status of an Indian tribe in the case of the *Cherokee Nation v. State of Georgia*, 5 Peters, 1, for he says, on page 18:

> "These considerations go far to support the opinion that the framers of our Constitution had not the In-

> dian tribes in view when they opened the Courts of the Union to controversies between a State, or the citizens thereof, and foreign States."

Another reason why a suit can not usually be maintained against a State to compel the payment of its debts, whether the plaintiff be an individual or a State, is that it might necessitate an interference with, if not the complete control and direction of, the legislative function of assessing, levying, collecting and distributing taxes, which is, as yet, beyond the competency of Courts; there is no means of rendering the decree effective, unless this Court is prepared to appoint a receiver with the extraordinary powers of taking charge of and administering the affairs of a delinquent State.

But the separation and careful demarkation of the functions of government into executive, legislative and judicial, is the distinguishing characteristic of our Constitution, State and National, and neither Department can transgress its proper bounds.

People ex rel. Broderick v. Morton, 156 N. Y., 136.

In *Cherokee Nation v. State of Georgia*, 5 Peters, 1, the bill was dismissed because the plaintiff was neither a foreign State nor a State of the Union; but at the close of his opinion, page 20, Chief Justice Marshall said:

> "The mere question of right, might, perhaps, be decided by this Court in a proper case with proper parties. But the Court is asked to do more than decide on the title. The bill requires us to control the Legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition

by the Court may be well questioned. It savors too much of the exercise of political power to be within the proper province of the judicial department."

Prof. Dicey, in his work on the *Conflict of Laws*, page 38, says:

"*General Principle* No. III.—The sovereign of a country, acting through the Courts thereof, has jurisdiction over (*i. e.*, has a right to adjudicate upon) any matter with regard to which he can give an effective judgment, and has no jurisdiction over (*i. e.*, has no right to adjudicate upon) any matter with regard to which he can not give an effective judgment."

Subsequently he explains that an effective judgment is one that can be enforced.

Judge Miller, in his work on the Constitution, page 314, says:

"Judicial power is, perhaps, better defined in some of the Reports of our own Courts than in any other place, and especially so in the Supreme Court of the United States, because it has more often been the subject of comment there, and its consideration more frequently necessary to the determination of questions arising in that Court than anywhere else. It is the power of a Court to decide and pronounce a judgment *and carry it into effect* between persons and parties who bring a case before it for decision."

The decision—or interlocutory order—in *Chisholm v. Georgia*, 2 Dallas, 419, undoubtedly was against this view, but that decision, as an interpretation of the original Constitution, was doubted by Mr. Justice Campbell in *Florida v. Georgia*, 17 Howard, and expressly dissented from by Mr. Justice Bradley,

delivering the opinion of the Court, in *Hans v. Louisiana, supra,* and may be considered to be overruled.

In the Notes by Davis to *Miller on the Constitution,* page 423, it is said:

> "In Hans v. Louisiana, 134 U. S., 1, which was an action against the State of Louisiana, brought by one of its citizens to recover on coupons annexed to bonds of the State, it was held that a State could not, without its consent, be sued in a Circuit Court of the United States, upon the suggestion that the case was one arising under the Constitution and Laws of the United States, and Chisholm v. Georgia, 2 Dallas, 419, commented on by Judge Miller in this chapter, was substantially overruled, the Court saying that the views of Mr. Justice Iredell, who dissented from the judgment, were clearly right."

The reasoning of Mr. Justice Iredell, in his judgment in *Chisholm's case,* is not so much that an action of assumpsit will not lie by an *individual* against a State, as that *no action of assumpsit,* by whomsoever brought, would lie against a State.

In arguing this proposition he says, on pages 445 and 446:

> "Now let us consider the case of a debt due from a State. None can, I apprehend, be directly claimed but in the following instances:
>
> "1. In case of a contract with the Legislature itself.
>
> "2. In case of a contract with the executive, or any other person in consequence of an express authority from the Legislature.
>
> "3. In case of a contract with the executive without any special authority.
>
> "In the first and second cases, the contract is evidently made on the public faith alone. *Every man*

> ***must know that no suit can lie against a legislative body.*** His only dependence, therefore, can be, that the Legislature, on principles of public duty, will make a provision for the execution of their own contracts, and if that fails, whatever reproach the Legislature may incur, the case is certainly without remedy in any of the Courts of the State. It never was pretended, even in the case of the Crown in England, that if any contract was made with Parliament, or with the Crown by virtue of an authority from Parliament, that a petition to the Crown would in such case lie."

The case of *United States v. North Carolina,* 136 U. S., 211, may also be cited against us. That was an action of debt on certain bonds held by the United States as Trustee for the Cherokee Indians. It is a matter of history that the State of North Carolina claimed that she did not owe the interest on the bonds, while the authorities of the United States claimed that she did. There were various efforts made to settle the dispute, and finally a case was agreed upon and submitted for judgment to this Court, no question being made as to the jurisdiction. It is true that in *United States v. Texas,* 143 U. S., Mr. Justice Harlan said that the question whether this Court had jurisdiction of a suit brought by the United States against a State did not escape its attention; but he evidently did not regard the case as controlling on this point, and, so far as appears, the point we are now endeavoring to make, to-wit: that States can not be made to pay their debts by process from this or any other Court, was not considered, and the burden of deciding the cause was imposed upon the Court, just as Mr. Justice Miller says, with some warmth, in *Hawes v. Oakland,* 104 U. S.,

450, 453, the burden of deciding stockholders' suits has been imposed upon the Federal Courts.

His language is so apposite to this cause that we quote it. He said:

> "If no non-resident stockholder exists, a transfer of a few shares is made to some citizen of another State, who then brings the suit. The real defendant in this action may be quite as willing to have the case tried in the Federal Court as the corporation and its stockholder. If so, he makes no objection, and the case proceeds to a hearing. Or he may file his answer denying the special grounds set up in the bill as a reason for the stockholder's interference, at the same time that he answers to the merits. In either event the whole case is prepared for hearing on the merits, the right of the stockholder to a standing in equity receives but little attention, and the overburdened Courts of the United States have this additional important litigation imposed upon them by a simulated and conventional arrangement, unauthorized by the facts of the case or by the sound principles of equity jurisdiction."

The case of *U. S. v. N. C.*, 136 U. S., 211, then, is a case where both parties invoked the jurisdiction of the Court and naturally it was not fully considered. The State consented to be sued.

Dicey on the *Conflict of Laws*, 212.

So we think the question whether this Court can give judgment against a delinquent State for a debt is not concluded against our contention by judgement.

In *U. S. v. Guthrie, 17 How.*, 284, 303, Mr. Goodrich was appointed Judge, and, before the expiration of his term, he was

removed and Mr. Fuller was appointed in his stead and received the salary. Mr. Goodrich, being refused, upon demand, the balance of his salary, brought mandamus against the Secretary of the Treasury to compel its payment. Upon writ of error this Court said:

> "The only legitimate inquiry for our determination upon the case before us is this: Whether, under the organization of the Federal Government, or by any known principle of law, there can be asserted a power in the Circuit Court of the United States for the District of Columbia, or in this Court, to command the withdrawal of a sum or sums of money from the Treasury of the United States, to be applied in satisfaction of disputed or controverted claims against the United States? This is the question, the very question presented for our determination; and its simple statement would seem to carry with it the most startling considerations—nay, its unavoidable negation, unless this should be prevented by some positive and controlling command; for it would occur, *a priori*, to every mind, that a treasury, not fenced round or shielded by fixed and established modes and rules of administration, but which could be subjected to any number of description of demands, asserted and sustained through the undefined and undefinable discretion of the Courts, would constitute a feeble and inadequate provision for the great and inevitable necessities of the nation. The government under such a *regime*, or, rather, under such an absence of all rule, would, if practicable at all, be administered not by the great Departments ordained by the Constitution and laws, and guided by the modes therein prescribed, but by the uncertain and perhaps contradictory action of the Courts, in the enforcement of their views of private interests."

These observations apply with equal force to the treasuries of the States, which are sovereign within the province of their reserved powers, including the management of their fiscal affairs.

The Constitution of North Carolina, Art. 14, sec. 3, provides:

> "No money shall be drawn from the treasury but in consequence of appropriations made by law."

So it is held in *Garner v. Worth,* 122 N. C., 250:

> "The Courts can not direct the State Treasury to pay a claim against the State, however just and unquestioned, where there is no legislative appropriation to pay the same; and when there is such an appropriation, the coercive power is applied not to compel the payment of the State liability, but to compel a public servant to discharge his duty by obedience to a legislative enactment."

See also

Railroad v. Jenkins, Treasurer, 68 N. C., 499, 504.
Shaffer v. Jenkins, Treasurer, 72 N. C., 275.

In many of the cases in this Court in which attempts have been made to collect debts from States there have been strong intimations that, over and above the objection that States are exempt from suit by the Eleventh Amendment, Courts had no process by which they could collect debts from States.

In *Marye v. Parsons,* 114 U. S., 325, 328, Mr. Justice Matthews, delivering the opinion of the Court, said:

> "So far as the contract with the complainant was, that the State should pay to him his coupons at maturity, there is, no doubt, a breach; but he asks no re-

lief as to that, *for there is no remedy by suit to compel the State to pay its debts.*"

In *in re. Ayers,* 123 U. S., 443, 491, Mr. Justice Matthews said:

> "The remedy sought, in order to be complete, would require the Court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection and disbursement of the tax in question, until the bonds, principal and interest, were paid in full, and that, too, in a proceeding in which the State, as a State, was not and could not be made a party. It needs no argument to show that the political power can not be thus ousted of its jurisdiction and the judiciary set in its place."

In *Rees v. City of Watertown,* 19 Wall., 107, 116, 117, the Court said:

> "We are of opinion that this Court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty and is exercised, first, to raise money for public purposes only; and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary; especially is it beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important."

See also

Heine v. the Levee Commissioners, 19 Wall., 655, 661.

Rose's Notes on United States Reports, Vol. 8, page 233.

Virginia Law Journal, March, 1879, article by Hon. W. H. Burroughs, entitled "Can States be Compelled to Pay their Debts?"

It may be said that, in this case, it is not necessary for the Court to levy, collect and disburse taxes, as there is property mortgaged, which the Court can seize and apply to the payment of any judgment which it may render; but that seems to us to be a narrow view of the subject, the real question being a much broader one, to-wit: whether a State can be made to pay its ordinary debts—bonds issued to individuals—by the compulsive process of this Court? And we think it beyond question that the grant of such power was not intended to be made by the Convention which formulated the Constitution, or the States which adopted it, and is therefore not included. Besides, suppose the mortgage should be invalid, as we think it is, or that there should not be property enough to pay all of the claims, would the Court grant a deficiency judgment, as is required in cases in the Circuit Court under Equity Rule 92 (*Northwestern M. L. Ass'n v. Keith,* 40 U. S., App., 716; 77 *Fed. Rep.,* 374), and if so, how is that decree to be carried into effect? Only by taking charge of the State's Treasury.

It has been suggested that it would be the duty of the Court to adjudge the indebtedness, even if compelled to leave it optional with the defendant State whether she would perform the decree. We submit that the course pursued by this Court in *Kentucky v. Dennison,* 24 How., 66, is much more befitting its

dignity—to decline jurisdiction unless it has ample power t execute the decree.

Not only that, "But no Court sits to determine question *of law in thesi.*"

Marye v. Parsons, 114 U. S., 330.

In *ex rel. Broderick v. Morton,* 156 N. Y., 136, the Court of Appeals, when asked for a mandamus against the Governor, declined, and in its opinion said:

> "Again, it is the well settled practice of the Court not to determine abstract questions not involved in the litigation, *or in regard to which it has no power to enforce its judgments and decrees.*"

II. If a suit can be brought upon the bonds of a State by another State, no such suit can be brought upon bonds transferred to the State merely because the holder of them cannot collect them.

We have attempted above to show that State debts could not be collected by suit, for two reasons:

First. That such suits were unheard of at the time of the adoption of the Constitution, and, therefore, not included within the grant of judicial power.

Secondly. That to do so would, or might, require the Courts to assume the political and legislative functions of levying, collecting and disbursing the public taxes of a State.

If we are wrong in this, we insist that the collection of debts from a recalcitrant State by the compulsive process of this Court should be confined to debts due directly to the complaining States upon dealings, contracts, transactions between

the States, or at any rate to obligations acquired "in due course of trade," if such an acquisition be possible.

Chancellor Kent, discussing the jurisdiction of this Court, expressed a grave doubt whether such an action as this would lie. He said, *1 Kent's Commentaries,* 297, note d:

> The result is (1) No citizen of any of the United States, or subject of a foreign State, can sue a State; (2) That a foreign State may sue one of the United States before the Supreme Court of the United States, and there only; (3) That the United States can not be sued; (4) That the United States may sue a State, and perhaps they may, as a *bona fide assignee* of an individual creditor of a State, and perhaps an individual State, or a foreign State, as such assignee may do it. (See Hamilton's Report on Public Credit, 1790, page 9.) This last point is without any judicial support that I am aware of; and it may be questioned how far voluntary assignments made and accepted for the sake of the remedy would be available."

We confidently insist that a thorough consideration of the subject will resolve all doubt against the right to sue.

When issued and in the hands of the original holders, indeed, until they came into the possession of the State of South Dakota, it is admitted that they were uncollectable by suit, were agreements of imperfect obligation, were pacts rather than contracts (Mackeldy Roman Law, sec. 393), and it is a general rule of law that no one can confer a greater right than he has—that the transferee must abide the title of his transferrer. *"Nemo dat quod non habet."* Fed. Case No. 1007.

After stating with his usual force and lucidity the general

rule, Professor Langdell, in his *Treatise on Equity Pleadings*, page 209, says:

> "But there have always been exceptional cases even at common law, in which a *purchaser for value* without notice acquired a perfect title regardless of the title of his vendor. One of these exceptions (in England) is that of goods sold in market overt; another is that of current coin paid and received as money; and this exception has been extended in modern times so as to include all negotiable securities payable to bearer. Another exception (under our recording acts) is that of the sale and conveyance of real estate to which the vendor has no title, in consequence of his having previously conveyed it to another person by an unrecorded deed. These exceptions, however, are all founded upon *public policy* and the merits of the individual purchaser, though a necessary element of his title, are by no means the controlling consideration in establishing and maintaining it."

It is difficult to see that commerce has languished because States have not been active competitors in the market for repudiated bonds, or that public policy will be subserved by encouraging, or even allowing, the assignment of the bonds of a State for the purposes of suit.

It has been supposed that the jurisdiction over controversies between two or more States was given to the Supreme Court for the purpose of settling disputes—allaying strife—and not for the purpose of fomenting quarrels. What surer method of arousing jealousies, engendering hostilities and retaliations can be conceived than by encouraging such suits between States? Such, at any rate, is the teaching of experience.

But these bonds were past due and unenforcible in the

hands of Simon Schafer, the assignor, when the assignment was made, and the transfer was voluntary; hence the transfer does not come within the terms of either of the exceptions mentioned by Prof. Langdell, above; and, unless there is some peculiar merit in the transferee, a sovereign State, the bonds were not made actionable by the transfer. We think they would not have been made actionable by transferring them before maturity, certainly not after dishonor.

It seems to be universally agreed that "a sovereign State can not be forced into Court against her consent; but a cross-bill presupposes that the plaintiff is already in Court rightfully, and when the State comes into Court of her own accord and invokes its aid, she is, of course, bound by all the rules established for the administration of justice between individuals."

Simonton, J., in *P. R. and A. R'y. Co. v. So. Car.*, 60 Fed. Rep., 552, 553.
Prioleau v. U. S., L. R., 2 Eq., 652.

In *The Siren*, 7 Wallace, 152, on page 159, it is said: "By its (the government) appearing in Court, as we have already said, it waives its exemption and submits to the application of the same principles by which justice is administered between private suitors."

These principles are illustrated in a great variety of cases.

Brent v. Bank of Washington, 10 Peters, 596.
United States v. Bank of Metropolis, 15 Peters, 377.
The Davis, 10 Wallace, 15.
United States v. Ingate, 48 Fed. Rep., 251.
United States v. Flint, Fed. Case No. 15,121.
United States v. Wilder, Fed. Case 16,694.

United States v. Union Natl. Bank, Fed. Case 16,597.
United States v. Barker, Fed. Case No. 14,520.

The chief, if not the only, exception to the principle that the Government when it invokes the aid of the Court, invokes the application of the principles of law and equity by which the Court administers justice between individuals are *laches and the statute of limitations.*

Notwithstanding the fact that the government, either State or National, is not barred by the statute of limitations, this Court held in U. S. v. Buford, 3 Peters, 12, that a claim barred by the statute of limitations, in the hands of the assignor, and afterwards assigned to the United States, could not be sued on; and the Court stated the law to be that "the assignment of a claim to the government gives it no greater validity than it possessed in the hands of the assignor."

To the same effect is:

U. S. v. N. C. and St. L. R. Co., 118 U. S., 125.
1 Cooley's Blackstone, 247, note (6).

This authority seems to us to be directly in point. A person holding an obligation of another, which is barred by the statute of limitations, has a valid moral claim against the person whose obligation he holds, but it is an imperfect obligation, that is, there is no remedy for its enforcement; so, an individual holding an obligation of a State has, perhaps, a valid moral claim against the State, but it is one of imperfect obligation, because there is no remedy to enforce it. The two cases seem to be analogous with reference to the remedy, and if a remedy is not given in the one case by assignment to another State, there is no reason to perceive why it would be given in the other.

It is also arguable that to hold that these bonds became actionable by assignment is to hold that the burden of an obligation can be increased by assignment beyond what was intended to be assumed by the obligor at the time of entering into the obligation; for it is certain that when these bonds were issued by the State of North Carolina, it was not intended by her, or understood by those who took them, that there was any other security for them than "the plighted faith of the State," and the same thing is true of them while in the hands of every holder prior to the complainant.

In *Tolehurst v. Ass. Port. Cement Mfrs.*, (1901) 2 K. B., 811, Mr. Justice Mathew, on page 816, says:

> "Whenever, by reason of change of business or change of parties, the result of an assignment would be to impose upon one of the contracting parties a greater liability than he ever intended to assume, the contract can not be assigned."

See also *Law Quarterly Review*, vol. 18, page 10.

In *Dicey on the Conflict of Laws*, page 534, speaking of the effect of an assignment, it is said:

> "Under whatever law the assignment takes place, the liability of the debtor, X, can not be increased through the assignment of the creditor to another person of the claim against the debtor."

If it is suggested that the "burden" of the obligation is not increased by the assignment, but only a remedy given to compel the performance of the obligation, we reply that both practically and legally the remedy is a very essential part of the obligation, and that, as taking away, or seriously clogging, a remedy is uniformly held to be an impairment of the obligation

of a contract (*Edwards v. Kearsey*, 96 U. S., 595-600) to give a remedy by suit in Court, where none such was intended to be given at the time of the original undertaking, is to seriously increase the burden, or liability, of the obligation.

The opinion that conferring the quality of suability on an agreement not originally suable, is an increase of the burden is sustained by the authority of Chief Justice Jay, who, at the end of his opinion in *Chisholm's case*, 2 Dall., 479, says:

> "That such suability may, nevertheless, not extend to all the demands, and to every kind of action, there may be exceptions. For instance, I am far from being prepared to say that an individual may sue a State on bills of credit issued before the Constitution was established, and which were *issued and received on the faith of the State, and at a time when no idea or expectation of judicial interposition were entertained or contemplated.*"

Again, as said by Mr. Campbell, a former Justice of this Court, in his argument in *New Hampshire v. Louisiana, supra:*

> "A court of chancery habitually condemns and repudiates all merchandising, huckstering, fomenting of litigations, though not within the prohibition of any enactment against champerty or maintenance."

Pollock on Contracts, page 294.

In *Hager v. Swayne*, 149 U. S., 242, 248, quoted in *Ball v. Halsell*, 161 U. S., 72, 80, it is said:

> "At common law, the transfer of a mere right to recover in an action at law was forbidden as violating the rule against maintenance and champerty; and,

> although the rigor of that rule has been relaxed, an assignment of a chose in action will not be sanctioned when it is opposed to any rule of law or public policy."

It is submitted that to sustain a suit brought by a State on an assignment of bonds because the holder can not collect them, tends to violate the highest considerations of public policy—the preservation unimpaired of the amicable relations between the States—and contravenes the spirit of the Eleventh Amendment, if it does not practically nullify that Amendment.

When the Constitution was pending for adoption, the colonies, or States, were heavily indebted from causes growing out of the war and otherwise, and it was insisted by the opponents of the Constitution, both in the public press and in the various State conventions, that that instrument would enable holders of the public securities of the States to harass those States and incommode the management of their fiscal affairs by assigning them so that they could be sued on in the Federal Courts. This view was vigorously combatted by Hamilton in the eighty-first number of the *Federalist,* and by Marshall, Madison and others, the chief supporters of the instrument; and Hamilton insisted that *"the contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will.* To what purpose would it be to authorize suits against States for the debts they owe? *How could recoveries be enforced?* It is evident it could not be done without waging war against the contracting State; and to ascribe to the Federal Courts, by mere implication, and in destruction of a pre-existing right of

the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable."

It was not, in the opinion of Chief Justice Marshall, so much the apprehension of a loss of dignity in being haled before a Court, as the danger of being compelled, by legal process, to pay their debts—the danger of having their complex fiscal affairs taken out of the control of the proper State officers and placed in the hands of this Court—that caused such universal alarm in the States and produced the movement for the passage of the Eleventh Amendment.

In *Cohens v. Virginia,* 6 Wheaton, 246, 406, Chief Justice Marshall said:

> "It is a part of our history that, at the adoption of the Constitution, all the States were greatly indebted, and the apprehension that these debts might be prosecuted in the Federal Courts formed a very serious objection to that instrument. Suits were instituted, and the Court maintained its jurisdiction. The alarm was general, and to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress and adopted by the State Legislatures. * * * We must ascribe the amendment to some other cause than the dignity of a State. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, *were persons who might probably be its creditors. There was not much reason to fear that foreign or sister States would be creditors to any considerable extent,* and there was reason to retain the jurisdiction of the Courts in those cases, because it might be essential to the preservation of peace. The amendment, there-

fore, extended to suits commenced or prosecuted by individuals, but not to those brought by States."

It was certainly the opinion of Hamilton, before the adoption of the Eleventh Amendment (81 Federalist), as the above quotation shows it to have been the opinion of Chief Justice Marshall, after its passage, that the States were in no danger of being coerced in the payment of their debts by an assignment of them to any one. Indeed, it was the opinion of that great Judge that to prevent a State from being coerced in the payment of their debts was the primary cause of the Eleventh Amendment. Such also is the expressed opinion of Mr. Justice Miller, in his Lectures on the Constitution, page 382. He says:

"The amendment just quoted was supposed to have settled the question of the suability of a State upon its obligations, or for its debts in any other mode than that to which the State should give its express consent, and that the Courts of the United States had no jurisdiction to entertain such suits. But curiously enough, after the lapse of ninety years, the suggestion of Hamilton in regard to the assignment by creditors to a State, who could not themselves sue in the Federal Courts, to parties who could sue the State in those Courts, has been acted upon.

"In the cases of New Hampshire v. Louisiana and New York v. Louisiana, reported in 108 U. S., 76, this precise question was brought up. Although the jurisdiction to sue a State in the Courts of the United States by the citizens of another State, or by citizens or subjects of any foreign State, was abolished by the Eleventh Amendment, there yet remained the right of one State to sue another. Certain creditors, therefore, of the State of Louisiana, who could not sue that State themselves, transferred by assignment the

evidence of their indebtedness, some to the State of New Hampshire and others to the State of New York, and these States brought suits in the Supreme Court of the United States against the State of Louisiana upon those obligations.

"The Court, after a very elaborate argument, decided that these actions could not be sustained; that 'the evident purpose of the amendment, so promptly proposed and adopted, was to prohibit all suits against a State by or for citizens of other States, or aliens, without the consent of the State to be sued, and that one State can not create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution by assuming the prosecution of debts owing by the other State to its citizen.'"

See also Mr. Davis' note on pages 652 and 653 of the same book:

"This amendment, which relates to suits against States, has been already fully considered both in the lectures and in the notes upon them. Chisholm v. Georgia was the direct and impelling cause for it. The States came out from the war of the revolution burdened with debt. Although Congress had made provisions for taking care of a part of that debt, a large amount was still outstanding. When they learned that a State could be sued in the Federal Courts, they hurried to make that an impossibility thereafter, Massachusetts taking the lead. The Eleventh Amendment, which effected that result, was proposed by Congress March 5, 1794, and was proclaimed January 8, 1798. It is a little remarkable that the decision which made it necessary should have been practically overruled nearly a hundred years after it was made."

Judson, *Constitutional History and Government of the U. S.*, 255.

Certainly one of the chief purposes of the people in adopting the Eleventh Amendment was to prevent States from being compelled to pay debts due to individuals, and on which they had no idea they could be sued at the time the loans were made, and if a debt which has been disavowed or repudiated can be collected by giving it to a State, the Eleventh Amendment becomes a dead letter. Individuals can enforce a substantial compromise by threat of assignment, or, as we think is attempted to be done in this case, enforce payment by giving a State a substantial commission for collecting the bonds.

To permit that would be to "keep the word of promise to the ear and break it to the hope," and in all human probability, to call into existence a new business of vast and unforeseen consequences, compounded of blackmail and barratry, which will scarcely make for concord and harmony among the sisterhood of States.

It will, of course, not be possible to confine this extension of jurisdiction to the disavowed public securities of the States, but it will with equal reason extend to all claims against States, contractual and non-contractual, which individuals may assert, and, being denied, may assign to a State enlisted in this novel and gainful enterprise; and we may expect soon to find the docket of this Court congested with such actions. What, then, becomes of the reserved rights of the States to manage their own domestic affairs in their own way? Nor is this a fanciful picture; there is scarcely any State which may not be thus called to the bar of this Court, even the great Commonwealth of Massachusetts, for we find, upon looking into the Supreme

Court Reports of that State, that claims have been made whi
that Court regarded as just, as between man and man, but whi
it could not enforce against the State for lack of jurisdiction.

Murdock Grate Co. v. Com., 152 Mass., 28.

That there is no absolute necessity for such jurisdiction
this Court is shown by the fact that we have lived for more tha
a century without its exercise; that it does not exist is made pro
able by the fact that it has not previously been invoked, a
though the circumstances which gave rise to it have existed fro
the beginning. The novelty of an action, under such circum
stances, is strong evidence that it is groundless.

Chief Justice Chase in *Miss. v. Johnson*, 4 Wall
475, 500.

Lord Bramwell in *Mogul Case* (1892), A. C., 25.

This view is well presented in a thoughtful article by Car
mon F. Randolph, Esq., in the May (1902) number of the
Columbia Law Review, entitled "Notes on Suits Between
States."

**III. If suits can be brought against a State upon
bonds so assigned to another State, the present suit
cannot be maintained, because it is a suit by the State
of South Dakota and Charles Salter, representing all
individual bondholders of the same class, against the
State of North Carolina and Simon Rothschilds, repre-
senting all of the first mortgage bondholders.**

Of course this is not the form in which the parties have
been arranged by the complainant in the pleadings, because, if
it had been, the Court would probably have refused to permit

the filing of the bill at all. Such, however, is, in effect, in substance, if not in form, this suit.

If we look at things and not at names, at substance and not at forms, as courts of equity always do, this is manifest.

This rule is especially applicable to parties and pleadings. In *1 Daniel's Chancery Practice* (6th A. Ed.), 191, note, it is said:

> "All persons having the same interest should stand on the same side of the suit, but if any such refuse to appear as plaintiffs, they may be made defendants, *their refusal being stated in the bill.*"

Under the Judiciary Act of 1789, which provided—

> "That the Circuit Courts shall have original cognizance, concurrent with the Courts of the several States, of all suits of a civil nature at common law, or in equity, where * * * the suit is between a citizen of the State where the suit is brought and a citizen of another State,"

the Court looked only to the arrangement of the parties on the record (*Coal Co. v. Blatchford,* 11 Wall., 172), but under the subsequent Act of 1875—and in this respect the present act is substantially similar—which provided:

> "That the Circuit Courts of the United States shall have original cognizance, concurrent with the Courts of the several States, of all suits of a civil nature and at common law or in equity, * * * in which there shall be a *controversy* between the citizens of different States,"

the Court will arrange the parties according to their real interest in the controversy, in order to ascertain whether it is one

between citizens of different States, and, consequently, whether the Court has jurisdiction of the cause (*Removal Cases*, 100 U. S., 457; *3 Rose's notes*, page 850). So, when the Constitution confers on this Court jurisdiction to hear and determine "controversies between two or more States," and "between a State and citizens of another State," the Court ought to look beyond the forms adopted by the pleader to the facts in order to ascertain between whom the *controversy* really exists.

It is true that in *Osborne v. The Bank*, 9 Wheat., 739, Chief Justice Marshall said that, in order to ascertain whether a State was sued, the Court would look only to the parties on the record, but that proposition has been overruled, and it is now settled law that, in order to ascertain whether a suit is being prosecuted against a State—to learn who is the real defendant—the Court will look beyond the record to see what will be the result of the suit. (*In re. Ayres, 123 U. S.*, 443). So, we think when the question is: is the suit one by an individual against a State? who is the real plaintiff? the Court will look beyond the record to the result.

Indeed, that is the rule applied by this Court in removal cases when the question is whether a State is the real plaintiff.

> *Missouri and Ry. Co. v. Mo. Rd., etc., Commrs.*, 183 U. S., 53.

If that is done, it will be found that the real controversy is: "The State of South Dakota and Charles Salter, representing himself and all individual holders of second mortgage bonds, against The State of North Carolina and Simon Rothschilds,

representing himself and all other holders of the first mortgage bonds." So arranged, would this Court have jurisdiction of the cause? We think not. Such a suit was not within the grant of jurisdiction by the Constitution as originally adopted.

In *California v. Southern Pacific Co.*, 157 U. S., 261, Chief Justice Fuller, speaking of the original jurisdiction of this Court, said:

> "The jurisdiction is limited, and manifestly intended to be sparingly exercised, and should not be expanded by construction."

When a State consented to be sued by another State in a proper controversy, it clearly did not *expressly* consent to be sued by such State *and an individual* (either directly or indirectly), and to hold that it did, would seem to require a decidedly expansive construction.

Such is the expressed opinion of Mr. Justice Curtis, who, in in *Florida v. Georgia*, 17 How., 478, on page 504, said:

> "The State of Georgia has consented to be sued by one or more States, or by a foreign State, and by no other person or body politic. The State of Georgia has consented to stand joined as a defendant with one or more States, or with a foreign State, and with citizens or subjects of a State other than the one bringing the suit, but with no other person or body politic. Certainly there is no power existing in this government to enlarge that consent so as to embrace in it anything to which it does not, by its terms, extend."

Again, in the Circuit Court, it is settled that the Court has no jurisdiction unless each one of the plaintiffs, arranged ac-

cording to their real interest, can maintain a suit against each one of the defendants, arranged according to their real interest in the controversy.

Removal Cases, 100 U. S., 457.
Strawbridge v. Curtiss, 3 Cranch., 267.
Smith v. Lyon, 133 U. S., 319.

In *New Orleans Pacific Railway v. Parker*, 143 U. S., 58, 59, it is said:

> "If a single bondholder has any right at all to institute proceedings, he is bound to act for all standing in a similar position, and not only to permit other bondholders to intervene, but to see that their rights are protected in the final decree."

And it has been held that if a suit is instituted between competent persons, others having the requisite interest are entitled to intervene, and if they do intervene, and do not have the requisite diversity of citizenship, the jurisdiction of the Court is ousted.

Mangles v. Donan Brewing Co., 53 *Fed. Rep.*, 515.
Cook on Stockholders (3d Ed.), sec. 827, note 2.
Morris v. Gilmer, 129 U. S., 315.
67 *Fed. Rep.*, 625.
Consolidated Water Co. v. Babcock, 76 *Fed. Rep.*, 243, 248.

Board of Trustees v. Blair, 70 *Fed. Rep.*, 416, 417.

If this be required merely because the Judiciary Act only confers jurisdiction on the Circuit Court of controversies be-

tween the citizens of different States, *a fortiori,* ought it to be so held when the Constitution confers jurisdiction upon this Court only of "controversies between two or more States"? and, in addition to that, the *Eleventh Amendment expressly prohibits suits by individuals against a State.*

Nor is it possible to escape the force of this argument by saying that the individuals are not necessary parties to the suit. It would scarcely lie in the mouth of the complainant to say this, because she has elected to bring the suit in the present form and with the present parties, but, if she did, the objection would be futile, because they are necessary parties.

Surely, the first mortgage bondholders are necessary parties, because there is a demand that the lien of the first mortgage bondholders be declared subordinate to that of the second mortgage, or, failing that, that it be declared due and payable so as to entitle the second mortgage bondholders to a sale of the stock freed from all liens.

All second mortgage bondholders are necessary parties because the pleadings put in issue the existence and priority of the first mortgage lien, the legality of the second mortgage bonds and the validity of the alleged mortgage by which they are claimed to be secured, and the determination of these questions necessarily affects all of the second mortgage bondholders.

In *California v. Southern Pacific Co.,* 157 U. S., 229, 257, Chief Justice Fuller, delivering the opinion of the Court, says:

> "We have no hesitation in holding that when an original cause is pending in this Court to be disposed of here in the first instance, and in the exercise of an

exceptional jurisdiction, it does not comport with the gravity and finality which should characterize such an adjudication to proceed in the absence of parties whose rights would be, in effect, determined, even though they might not be technically bound in subsequent litigation in some other tribunal."

Minnesota v. Northern Securities Company, 184 U. S., 199.

We may safely conclude, then, that no Court has jurisdiction of an action brought by a State *and an individual against another State, first, because it is not within the original grant of judicial power; and second, because it is forbidden by the Eleventh Amendment.*

But whether the parties be re-arranged according to their real interest in the controversy or not, the result of a successful prosecution of this suit will equally be to enable the individual holders of the second mortgage bonds to collect them from the State by suit against her consent, contrary to the provisions of the Eleventh Amendment.

That such would be the result can not be denied; that it contravenes the spirit of the Eleventh Amendment is equally true; and that it is forbidden by that Amendment we earnestly maintain.

The general rule for the construction of a constitutional provision is so to construe it as to subserve its general purpose (*Legal Tender Cases*, 12 Wall., 531), and, in its later decisions, this Court has applied that rule with liberality to the Eleventh Amendment.

Fitts v. McGhee, 172 U. S., 516, 528.

In the *Va. Coupon Cases*, 114 U. S., 332, Mr. Justice Bradley, delivering a dissenting opinion on behalf of himself, the Chief Justice and Justices Miller and Gray, said:

> "Moreover, the Eleventh Amendment is not intended as a mere formula of words, to be slurred over by subtle methods of interpretation, so as to give it a literal compliance, without regarding its substantial meaning and purpose. It is a grave and solemn condition, exacted by sovereign States, for the purpose of preserving and vindicating their sovereign right to deal with their creditors and others propounding claims against them, according to their own views of what may be required by public faith and the necessities of the body politic. We have no right, if we were disposed, to fritter away the substance of this solemn stipulation by any neat and skillful manipulation of its words. We are bound to give it its full and substantial meaning and effect."

And in the subsequent case of *Hans v. Louisiana*, 134 U. S., 1, which was an action by a citizen of that State against her, the action was dismissed as not being within the grant of judicial power and against the spirit and purpose of the Eleventh Amendment, and Mr. Justice Bradley, on page 15, said:

> "The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of. Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own State in the Federal Courts, whilst the idea of suits by citizens of other States, or foreign States, was indignantly repelled? Suppose that Congress,

when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States; can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face."

This language is equally applicable to the present suit.

When we remember the excitement and indignation caused by the decision in *Chisholm's case,* and the promptitude and unanimity with which it was overruled by the passage of the Eleventh Amendment, it is not reasonable to suppose that it was intended to permit States to be sued by individuals—to allow States to be coerced into the performance of obligations to individuals by suits—by the simple device of assigning a part of the claim held by the individual to a State and letting that State sue, making the individual—the real plaintiff—a co-defendant with the State. The Constitution prohibits *things,* not *names.*

Craig v. Missouri, 4 Peters, 410, 435.

In *Parlement Belge,* 5 L. R. P. D., 197, a libel *in rem* was filed in the Court of Admiralty of Great Britain for damages for collision against the Parlement Belge, an unarmed packet, the property of the King of the Belgians. No appearance was entered for defendant, but the Attorney-General filed an information and protest against the Court taking jurisdiction, because it was a suit against a foreign sovereign. It was argued that the suit was not against the sovereign, because he was not personally made a defendant, but in the judgment delivered by

Lord Esher, it was held (page 219) that that which could not be done directly could not be done indirectly—that the immunity of a sovereign from suit was not so easily to be destroyed—and the action was dismissed.

See also:

Cunningham v. M. and B. R. R., 109 U. S., 446.
Mighell v. Sultan of Johore (1894), 1 Q. B., 149, 154.
Jarbolt v. Moberly, 103 U. S., 580, 585.

In the argument of *Ex parte Garland*, 4 Wall., 334, 338, counsel for petitioner (Messrs. Reverdy Johnson and M. H. Carpenter) said:

> "In discussing the constitutionality of any law of Congress (or any other act), the real question is, would the act accomplish a result which the Constitution forbids? If so, no matter what may be the form of the act, it is unconstitutional."

In *Blacklock v. Small*, 127 U. S., 96, Jacob Small, a citizen of the State of South Carolina, executed a bond to Blacklock for the sum of $10,600 and mortgage to secure the same upon certain property in said State.

Blacklock assigned and transferred for value the bond to Alex. Robertson, in trust for the three children of Blacklock, Emma Jane Blacklock, Mary Blacklock and Helen Robertson Blacklock. Small pretended to pay the bond and mortgage to Robertson in the notes of the Confederate States, and Robertson satisfied the mortgage of record and delivered up the bond to Small.

Two of the children of Blacklock, Emma Jane and Mary, being citizens and residents of the State of Georgia, brought a bill in equity in the Circuit Court of the United States against Small, a citizen of South Carolina, Robertson, a citizen of North Carolina, and Helen Robertson Blacklock, a citizen of South Carolina, for the purpose of annulling the payment of the bond in Confederate notes, the satisfaction of the mortgage, and the re-establishment and foreclosure of the said mortgage lien.

Small interposed a plea to the jurisdiction because the plaintiffs, as well as himself, were citizens of South Carolina when the bill was filed. This plea was overruled. Small answered, as did also Robertson. The defendant Helen Robertson Blacklock put in an answer admitting the allegations of the bill, and generally joined with the plaintiffs in the prayer for relief.

This Court decided that the Circuit Court was without jurisdiction, and directed it to dismiss the bill, Mr. Justice Blatchford delivering the opinion of the Court, on page 104, said:

> "There is another difficulty in the case, on the question of jurisdiction. The bond was a unit; the mortgage was a unit; and the assignment of the bond by Blacklock to Robertson, in trust for the children of Blacklock was a unit. The bond can not be enforced against Small, nor can the mortgaged premises be sold, in favor of the two plaintiffs alone. *The relief asked in the suit must necessarily be* for the benefit of the defendant Helen Robertson Blacklock, as well as for the benefit of the plaintiffs, especially as, by her answer, she arranges herself on the side of the plaintiffs as against Small, joins in the prayer of the bill, and

asks that the payment of the bond and the satisfaction of the mortgage be declared void, and that the bond and mortgage be declared valid in the hands of Robertson, as trustee for the benefit of herself and the plaintiffs, and that Small be decreed to pay to herself and the plaintiffs the amount of money secured by the bond and mortgage, with interest. The suit is, therefore, shown to be one substantially by and for the benefit of Helen Robertson Blacklock, and the proofs show that, at the time of the commencement of the suit, she was and has since then always continued to be, a citizen of South Carolina, of which State Small was and is a citizen."

To sustain this action and to give judgment in accordance with the prayer of the bill will, we submit, be to accomplish an unconstitutional result, and that by indirection.

We contend further:

That this suit is commenced and prosecuted by, or for the benefit of, individuals.

The case of *New Hampshire v. Louisiana,* 108 U. S., 76, establishes the proposition that an individual can not invoke the original jurisdiction of this Court in a suit against one State by using the name of another State—that a State can not maintain a suit against another State on behalf of private individuals.

In that case, the Chief Justice, on page 89, said:

"No one can look at the pleadings and testimony in these cases without being satisfied, beyond all doubt, that they were, in legal effect, commenced, and are now prosecuted, solely by the owners of the bonds and coupons."

We insist that the same thing can, with equal propriety, be said of the pleadings and testimony in this case.

Of course, the scheme is not so transparent as in those cases, because, apparently, it was there thought that the legal title to the bonds was alone necessary to entitle the State of New Hampshire to maintain the suit; just as, in this case, it seems to be supposed that all that is necessary to enable a State to maintain such a suit—and that it was so decided in those cases—is that she should be the actual owner of the bonds; whereas, in our view, *the principle established by those cases is that, by no scheme or contrivance, can a suit be commenced or prosecuted which, in effect, is a suit by individuals against a State.* And such this suit clearly appears to be.

Simon Schafer and his brother Samuel Schafer, a firm of brokers in the city of New York, own and practically control all of the bonds of the class sued on (record, page 65). Indeed, they purchased eight of these bonds after they had been sent to the State of North Carolina for refunding, and had been marked as cancelled. (Record, page 66). All of the bonds of this class are claimed to be secured by a lien upon the State's stock in the North Carolina Railroad Company, so that a foreclosure must be on behalf of all the creditors. The Schafers declined to accept the offer of the compromise made by the State of North Carolina, and which was accepted by the great majority of the holders of those bonds (and which compromise alone enabled the State to resume the payment of the interest on its debt); they employed, directly or indirectly, nu-

merous counsel; they petitioned the General Assembly of North Carolina in March, 1901, to make provision for the payment of these bonds, which was rejected, and soon thereafter, to-wit, in the latter part of the month of March, 1901, an act was passed by the Legislature of South Dakota authorizing the acceptance by the State of donations, and empowering the Attorney-General to sue to collect the same, and that Mr. Marion Butler, at the time a Senator from North Carolina, was spoken to in the fall of 1900, and *became counsel for the Schafers* as early as January, 1901, and induced his friend, Senator Pettigrew, of South Dakota, to use his influence to have this act passed (record, page 180); that the act came from the committee of which Mr. R. W. Stewart, solicitor for complainant, was a member; that Governor D. L. Russell, leading counsel of record for the individual bondholders, says in his testimony that he may have discussed with other lawyers the feasibility of assigning a portion of these bonds to a State in order to enable that State to sue and collect the bonds for the other holders.

Governor Russell's testimony on that point is as follows:

> "Q. Did you have any information from any source whatever, from any parties whatever, prior to the time you were employed as counsel for any of the holders of the second mortgage bonds, that it was in contemplation by any parties or persons whatever to so place a portion of the said mortgage bonds as to enable some State to bring action, or a suit in the Supreme Court of the United States against the State of North Carolina to recover the said second mortgage bonds?
>
> "(Same objection on part of counsel for complainant.)
>
> "A. Oh, I might have heard some such talk; the matter was discussed, I remember having some talk

with Mr. Busbee about it; well, I guess that was in March, too, or April, 1901.

"Q. Do you know at whose suggestion a bill was introduced in the Legislature of South Dakota in 1901, to enable that State to accept or receive a gift of any of the second mortgage bonds, or of any bonds, and what the purport of that bill was?

"(Same objection on part of counsel for complainant.)

"A. Oh, I think I heard Colonel Stewart, of South Dakota, and possibly Mr. Burke, say that they had the bill introduced, or that one of them had introduced it, or something of that sort.

"Q. I will ask you if you did not, at the same time, learn that the chief purpose of that act was with a view to receive from the Schafers a donation of the bonds now in suit, and with a view of bringing a suit against North Carolina to recover?

"(Same objection on part of counsel for complainant.)

"A. Oh, it is not improbable that such an inference was made; it may be that such conclusion was inferential from what they said.

"Q. Do you know, Governor, that the bill was going to be introduced in the Legislature of South Dakota before it was done?

"(Same objection.)

"A. I think I did hear it mentioned.

"Q. Did you know that Simon Schafer was going to donate ten bonds to the State under that bill?

"(Same objection.)

"A. Did I? No, sir, I did not know that he was going to do it, and, indeed, I am quite sure, or I have reason to believe, at least, that he was not willing to do it until about March, 1901.

"Q. Well, did you know why Simon Schafer was not willing to do it before that date?

"(Same objection.)

"A. Well, yes, I knew. I know what he said, but I shall not state what he said for reasons already given." See record, pages 108-109.

Governor Russell further testifies that his impression is that Mr. Peckham, counsel for complainant, was employed or consulted with regard to these second mortgage bonds some time in March, 1901 (record, page 104), and *the bonds were not given to the State of South Dakota until September 21, 1901.*

It further appears from the testimony of Samuel Schafer that Simon Schafer was the member of the firm who had the active management of these bonds, and that he is dead; that he had no interest whatever in the State of South Dakota, financial or personal, and probably never had visited that State (record, page 73). That Simon Schafer gave ten out of a total of about two hundred and fifty of these bonds to the State of South Dakota, because, as he explained to his brother Samuel, when the latter objected to the gift of those bonds, the gift would probably inure to the benefit of their remaining bonds (record, page 74). It further appears that the bonds were delivered, as said above, on September 21, 1901, through Congressman Burke.

Mr. Burke says that Mr. Pettigrew induced him to use his influence to have the act passed, assuring him that other States had done so, and that the State of South Dakota might thereby obtain donations, including some Southern bonds. It is evident that Mr. Pettigrew did not disclose much of the

scheme to Mr. Burke, but did say that a suit on the bonds might be necessary.

Mr. Burke further says that in a conference had between himself, Governor Herried and Colonel Stewart, before suit was brought, but he thinks after delivery of bonds, although not positive as to that, something was said about the necessity of a suit; that no demand was made by the authorities of South Dakota upon the State of North Carolina for the money, nor any effort made for an adjustment of the claim, but almost immediately after the donation, suit was brought in this Court against the State of North Carolina, and the first notice which that State had of the alleged ownership of the bonds was a statement in the newspapers that application had been made to file such a bill in the Supreme Court of the United States!

Governor Herreid says, in explanation of this strange conduct, that the negotiations were had between Congressman Burke, representing the Schafers, and Attorney-General Pyle, who is dead, and that he, the Governor, knew little about the matter, but assumed that Mr. Pyle would do what was proper and necessary in the premises, but he admits that he understood that a suit would probably be necessary to recover the money, and he understood that Col. R. W. Stewart had already been employed to assist Mr. Pyle at the time when the donation was made (record, page 36). And the letter to Hon. Charles H. Burke, in which the donation was made, and which was put in evidence by the complainant (record, page 39), and handed by Mr. Burke to Governor Herreid at the time of the donation

of the bonds, and containing the conditions upon which the donation was made, contains this sentence:

> "The holders of these bonds have been advised that they can not maintain a suit against the State of North Carolina on these bonds, but that such a suit can be maintained by a foreign State, or by one of the United States."

It further appears that the bonds which were owned by the defendant Charles Salter have been and are under the control of the Schafer Bros. That Simon Rothschilds, who is made defendant as representing the first mortgage bondholders, has only two of those bonds and sixteen of the class owned by the complainant and Schafer Bros., and that his sixteen are in the custody and control of the Schafers.

The prayer of the bill asks for an accounting of all of the bonds, and in default of payment, a sale of the stock to pay all bonds, *and the answer of Charles Salter, the representative of the Schafers,* admits the allegations of the bill and asks that it be dismissed unless the Court will decree not only in favor of the complainant, but in favor of all of the individual holders of the so-called second mortgage bonds.

Is it not clear from this brief recital that the Schafers are the actors, the moving spirits, the real plaintiffs, in this suit? Can any one read the pleadings and testimony without seeing that this suit is instituted in pursuance of a scheme invented by the Schafers, or their counsel, to collect these bonds by hiring the State of South Dakota to bring the suit, instead of simply employing lawyers, as has been the practice heretofore with those wishing to institute legal proceedings?

We submit that it is not necessary that the donee—the State of South Dakota—should be shown to have participated consciously in this wicked scheme—although the only persons by whom the truth of the matter could be shown *are either dead or shield themselves behind the privilege of attorney and client,* Governor Herreid and Mr. Burke evidently being kept in the dark, as they could not so hide—it is sufficient that she, being a mere volunteer, should become the passive instrument of the bondholders in carrying out their scheme.

We respectfully insist that the suit was commenced, and is prosecuted, *solely* for the benefit of the private bondholders, and in the event of recovery they are the *sole beneficiaries,* after deducting, of course, the expenses of the suit, including the fee to South Dakota. We can not believe that the prohibitions of the Eleventh Amendment can so easily be nullified.

ON THE MERITS.

The defendant, the State of North Carolina, contends:

First—That these bonds were disposed of contrary to the provisions of the enabling statute (chapter 228 Acts 1854-'55) and are, therefore, illegal and uncollectable.

Second—That the provisions of the law (Chapter 106, Acts 1866-'67) authorizing the second mortgage upon the stock of the State for the security of the aforesaid bonds was not complied with, and hence there is no valid mortgage securing the said bonds, or any of them.

First—The bonds were issued contrary to the provisions of the enabling statute, and are illegal.

No one, however unacquainted with the strenuous efforts and manifold sacrifices which the State of North Carolina made to secure connection between the eastern seaboard and the transmontane sections of the State, can read the charter of the Western North Carolina Railroad and the other acts with reference thereto, printed in the record, without seeing that it was the chief purpose of the State to secure the building of this railroad as speedily and with as little outlay as possible. To accomplish this, it was evidently thought best to make the donation to the Western North Carolina Railroad in cash, and not in bonds, and hence it was provided that the public Treasurer should advertise in one or more newspapers and invite sealed proposals for such amount of the bonds as might be necessary to sell at one time, but in no event were the bonds to be sold for less than their par value. If they brought more than par, the surplus was to be turned into the State Treasury.

The legislation upon that subject is as follows:

Laws of 1854-55, chapter 228, An act to incorporate the Western North Carolina Railroad Company.

* * * * * * * * *

"SEC. 8. Be it further enacted, that whenever it shall appear to the Board of Internal Improvements of this State, by a certificate signed and sealed by said General Commissioners, or a majority of them, that the sum of three hundred thousand dollars has been subscribed for and taken, and the five per cent paid in thereon, the said Board of Internal Improvements shall be, and they are hereby authorized and required to direct the Treasurer of the State to subscribe on behalf of the State for the stock in said company to the

amount of six hundred thousand dollars in the capital stock of said company."

* * * * * * * * *

"SEC. 35. Be it further enacted, that as soon as it may become necessary to borrow the money for the payment of the subscription by this act authorized, the public Treasurer shall issue coupon bonds, signed by himself, and countersigned by the Comptroller, in sums not less than five hundred dollars each, pledging the State for the payment of the sum therein mentioned, with interest thereon at the rate of interest not exceeding six per cent per annum, payable semi-annually, at such times and places as the Treasurer may appoint, the principle of which bonds shall be redeemable at the end of thirty years from the time the same were issued; but no greater (number) of such certificates shall be issued at any one time than may be sufficient to meet the installments required to be paid by the State at that time."

* * * * * * * * *

"SEC. 37. Be it further enacted, that so soon as it shall become necessary to issue the bonds aforesaid, the public Treasurer shall advertise in one or more newspapers, as he may think best, and invite sealed proposals for such amount of the aforesaid subscriptions as may be wanted at any one time, and it shall be his duty to accept those terms which may be most advantageous to the State: *Provided*, that in no event shall any of the said bonds be sold for less than their par value; and any premium which may be obtained on the sale of said certificates shall be placed in the public treasury and used as other public funds, and kept or invested to pay the interest on the debt hereby authorized."

The evidence of Dr. Battle (record, pages 83, 84), shows that advertisement was made; that no sealed proposals for the bonds were received; that the bonds were not sold at all, but that

they were turned over to the railroad company, and that the railroad company gave receipts for them. (See record, page 84.) And the railroad company sold the bonds through brokers at prices ranging from twenty-three to sixty-seven per cent of their face value. This testimony of Dr. Battle, Treasurer of the State at the time, is corroborated by that of Dr. J. J. Mott, at one time President of the Western North Carolina Railroad, who sold a portion of these bonds.

Counsel attempted to show that this method of disposing of the bonds was regular and legal, because it amounted to a purchase of a certain amount of stock in the Railroad for that amount of the State bonds, but it is manifest that the State was not dealing with this railroad upon commercial terms. Dr. Battle and Dr. Mott both say that no actual subscription was ever made, other than that which appears in the statutes relative to the subject, by any one on behalf of the State of North Carolina, upon the books of the Western North Carolina Railroad Company, and both Dr. Battle and Dr. Mott properly regarded the provision of the law for the issue and sale of the bonds as an appropriation, or donation, by the State to the railroad company.

We do not think that it would require argument to show that the method of disposing of the bonds was contrary to the provisions of the statute, because they were not sold by sealed proposals and for par; indeed, they were not sold at all, and, as between the State and the railroad company, the first taker, were illegal and void.

But we understand the position of complainant to be that whether the bonds were illegally issued and sold or not, is immaterial, because complainant is a holder for value in due course.

If this be true, it must be, of course, through the merit of some antecedent holder, for complainant not only took the bonds after their maturity, but paid nothing for them.

Admitting freely the presumptions in favor of a holder of negotiable paper, yet we understand the law to be that when proof has been given of fraud or illegality in the issue of paper, the burden is cast upon complainant to show that she is a purchaser for value without notice and in due course.

Smith v. Sac County, 11 Wall., 139.
Combs v. Hodge, 21 How., 397.
Collins v. Gilvert, 94 U. S., 753.
Stewart v. Lansing, 104 U. S., 505.

As these bonds were issued and disposed of contrary to the provisions of the enabling statute, they were illegal, and this fact, together with the admitted fact that complainant received the bonds as a donation, and after their maturity, casts the burden of proof upon her to show that some one of her predecessors in title were innocent purchasers for value, and this we submit she has not done.

As previously said, it appears from the testimony of Dr. J. J. Mott and Mr. H. C. Cowles (record, pages 94-102) that these bonds were sold by the Western North Carolina Railroad Company, to which they had been improperly turned over, at from twenty-three to sixty-seven per cent of their face value, and that they were not sold until some time after the first coupons had

become due. It appears from the exhibits that the first coupon on the ten bonds held by complainant is due January 1, 1869; that is, that some of the interest coupons have been cut from the ten bonds held by complainant, but all the rest are still attached thereto.

It also appears from the testimony of Mr. Schafer (record, page 68), that he and his brother had had these bonds for about thirty years; that is, they were purchased about 1872; and that no interest had been paid upon any of these bonds so far as he knew.

The burden being upon the complainant to show that they, or their assignor, took the bonds free from all infirmities, we insist that we have a right to infer from this testimony that when the Schafers purchased these bonds in 1872, they purchased them with all interest coupons attached thereto, due from January 1st, 1869, until January 1st, 1872, inclusive, and that they were purchased at a small percentage of their face value.

Do the facts that the Schafers, who are the only persons whose title complainant rests upon, purchased these State Bonds with over-due interest coupons attached and at a small percentage of their face value, deprive them of the protection given to *bona fide* purchasers for value in due course? We think they do.

In *Hulbert v. Douglas*, 94 N. C., 122, the Supreme Court of North Carolina held:

> "If the endorsee of a negotiable instrument before its maturity, knew, or if such facts came to his knowledge, which, if inquired into, would have informed

him of an equity of the maker, he takes the instrument *cum onere.*" See also *Farthing v. Dark,* 109 N. C., 291.

This Court, in *Parsons v. Jackson,* 99 U. S., 434, said, on page 444:

> "Our opinion is, that the appellant had abundant cause to question the integrity of these bonds; that they were effected with notice of their invalidity, and can not be allowed to sustain the position of *bona fide* holders without notice. The presence of the past-due and unpaid coupons was itself an evidence of dishonor, sufficient to put the purchasers on inquiry."

See *Rose's Notes, Volume 9,* page 737.

In the subsequent case of *Railway Company v. Sprague,* 103 U. S., 756, commenting on the case of *Parsons v. Jackson,* the Court, on page 762, said:

> "It is true the Court said that the presence of the past-due and unpaid coupons was of itself an evidence of dishonor sufficient to put the purchaser on inquiry.
>
> "But the case did not turn on this circumstance alone. There were other significant indications of the invalidity of the bonds, and the opinion must be restricted to the case before the Court.

In *London Joint Stock Bank v. Simmons* (1892), A. C., 201, Lord Herschell, discussing the question of what constitutes "good faith" in a purchaser of negotiable securities, said, on page 221:

> "One word I would say upon the question of notice, and being put upon inquiry. I would be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments. But regard to the facts of which the taker of such instruments had notice is most material in considering whether he took in good faith. If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith, if he shuts his eyes to the facts presented to him and puts his suspicions aside without further inquiry."

Applying this rule, we do not think the Schafers (for under the evidence, we have to deal with their title alone) are entitled to the position of holders for value without notice.

Different to the bonds referred to in the cases of Railway Company v. Sprague and Parsons v. Jackson, *supra*, these were State bonds; were purchased at a very small percentage of their value and with over-due interest coupons attached.

Clearly these circumstances were sufficient to put a reasonable person upon notice that something was wrong with the bonds, and if inquiry had been made and an examination of the statutes authorizing the bonds, it would have appeared that they were not issued in accordance with the provisions of that statute, and we respectfully insist, brings this case within the principle of the decision of *Trask v. Jacksonville, etc., R. R. Co.,* 124 U. S., 515.

In that case, Chief Justice Waite, in discussing the question whether one Coddington was a *bona fide* holder of bonds, said, on page 517:

"As the bonds were State bonds, the mere fact that no interest had ever been paid, furnished the strongest presumptive evidence that they were dishonored."

But if we are wrong in this and the Court should be of opinion that the Schafers were *bona fide* holders for value, we submit that, as the bonds were not suable in their hands, they ought not to become suable in the hands of a transferee unless that transferee took them for value and without notice of dishonor; *even if such controversies are within the jurisdiction of this Court.*

As we have hereinbefore attempted to show, a transferee has no higher or further rights than the transferer, unless in the exceptional cases under our recording acts and negotiable paper taken for value before maturity and without notice.

To permit the State of South Dakota to collect these bonds by suit, whether they were illegally issued or not, will be to add another exception to the rule that a man can not give what he does not own or possess.

Second—The provisions of the law (Act 1866-'67, chapter 106) authorizing a mortgage upon the State's stock in the North Carolina Railroad in favor of the holders of the bonds of the class sued on were not complied with, and the mortgage is invalid.

The provision is as follows:

"Section 1. Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by authority of the same, that the Public Treas-

urer be and he is hereby authorized and directed, whenever it shall become his duty under the provisions of said acts, passed at the session of 1854-'55 and 1860-'61, to issue bonds of the State to the amount of fifty thousand dollars or more, to mortgage an equal amount of stock which the State now holds in the North Carolina Railroad, as collateral security for the payment of said bonds, and to execute and deliver, with each several bond a deed of mortgage for an equal amount of stock to (of) said North Carolina Railroad, said mortgage to be signed by the Treasurer and countersigned by the Comptroller to constitute a part of said bond, and to be transferable in like manner with it, as provided in the charter of said Western North Carolina Railroad Company; and further, that such mortgage shall have all the force and effect, in law and equity, of registered mortgages without actual registry."

It is clear that the statute contemplated and promised a mortgage lien upon ten shares of stock for each bond of the par value of one thousand dollars, and not a second mortgage upon the whole of the State's stock in the North Carolina Railroad Company.

At the time when these bonds were issued and the endorsement thereon made by the Treasurer, the State owned a certain proportion of the capital stock of the North Carolina Railroad, but no certificates of stock had ever been issued to the State (Dr. Battle's testimony, record, page 83); and, according to the allegations of the bill and the testimony, the State owned stock in the North Carolina Railroad Company of the par value of three millions of dollars, and issued bonds of the class sued on only to the amount of the par value of two million five hundred thousand dollars.

The most casual reading of the endorsement upon the bonds, purporting to give a statutory mortgage upon the State's stock, will show that no stock was designated or described in such way as to be capable of identification, and, therefore, we respectfully submit, no particular stock has been subjected to the lien of a mortgage.

It is evident, and we admit, that the statute authorized a mortgage in favor of the holders of the bonds, but it has never been executed, and therefore the only claim which the holders of the mortgage have against the State is, not a *lien* upon any particular stock owned by the State, but *a cause of action* for the breach of contract to give the mortgage.

In North Carolina, and we assume the validity of the mortgage is to be determined by that law, it is settled, in accordance with the general principles of the law, that a mortgage purporting to be upon a certain number of things, out of a larger number, and in no other wise designated, is invalid as a mortgage.

Waldo v. Belcher, 11 Ired. L., 609.
Blackley v. Patrick, 67 N. C., 40.
Stevenson v. Railroad, 86 N. C., 455.
Holmes v. Whitaker, 119 N. C., 113.
Jones on Chattel Mortgages, sec. 56.
Kilgore v. New Orleans Gas Co., 2 Wood, 144.

Nor is the claim on behalf of the mortgage stronger in equity than at law, because in order to constitute an equitable mortgage, it is equally necessary to identify the subject-matter.

Halroyd v. Marshall, 10 H. L., 189.

Walker v. Brown, 165 U. S., 654.

19 Enc. of Law, page 14, and authorities.

The same rule prevails in actions for the specific performance of a contract.

See *Lighthouse v. Third National Bank,* 162 N. Y., 336.

And we understand the law to be the same, whether the alleged mortgage be statutory or conventional.

In *Jones on Liens,* sec. 106, it is said:

> "A statutory lien can exist only when it has been perfected in the manner prescribed by the statute authorizing it. Thus, under an act which created a building association and provided that the shares of stock should, from the date thereof, be a lien on the real and personal estate of the corporation, it was held that the mere payment of the subscription for shares without their being actually issued, did not create a lien on the property of the Association. The subscriber became entitled to the rights of a stockholder in the Association by such payment, but the lien did not necessarily flow from the relation of stockholders to the Association. It was necessary under the statute that the stock should be actually issued in order to create a lien which could be enforced against other encumbrances, for the statute declared that the stock should be a lien only from the date of the certificate."

See also *Tycross v. Dreyfus,* 5 Ch. Div., 605.

We think, therefore, that the complainant has no lien upon any property, and her only right of action, if any, is for damages for breach of contract, and this, as we have attempted to show, this Court will not entertain.

Finally, if the Court shall be of opinion that it has jurisdiction of the cause, and that complainant is entitled to recover anything, she is not entitled to recover interest upon overdue coupons.

United States v. North Carolina, 136 U. S., 211.

We respectfully submit that the action should be dismissed.

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No. 9—ORIGINAL.

IN THE

SUPREME COURT OF THE UNITED STATES.

IN EQUITY.

THE STATE OF SOUTH DAKOTA, COMPLAINANT,

vs.

THE STATE OF NORTH CAROLINA, CHARLES SALTER AND SIMON ROTHSCHILDS, DEFENDANTS.

NOTES TO GENERAL AND SUPPLEMENTAL BRIEFS SUBMITTED BY NORTH CAROLINA ON THE REARGUMENT.

Fraud on the Jurisdiction.

The testimony upon this point is discussed in the supplemental brief, beginning at page 29 and ending at page 49. See also pp. 55-62, inclusive, general brief.

In view of this testimony there really cannot be a doubt as to the purpose of these assignors in making the voluntary assignment of the ten bonds sued upon to the complainant State. Neither in the brief of the complainant, nor in the argument of its counsel, nor the counsel of its allies (the defendants, Salter and Rothschilds), submitted at the former hearing, is there the slightest attempt made of a denial of the transparent purpose of procuring a suit to be brought by the complainant State in order

that the holders of the remaining second mortgage bonds (owned or controlled by the donors, the Schaffers) might be drawn, as necessary parties defendant, within the jurisdiction of this Court, and thus participate in the proceeds of a foreclosure sale of the stock. The Court is earnestly requested to scrutinize the testimony with a view of determining whether *every contention* of fact in the parts of the two briefs of the defendant State, above referred to, is not *either admitted or sustained by absolutely uncontradicted testimony.* Realizing this, the counsel of the complainant and its allies, the co-defendants, do not pretend, as we have said, to deny the inevitable conclusion that must follow as to the scheme concocted whereby the Eleventh Amendment is to be evaded. The audacity of this attempt to evade a great and vital constitutional principle is well illustrated by the letter of Schaffer accompanying the gift (in which the holders are spoken of as persons who give liberally "to the needy and unfortunate," p. 39, supplemental brief) and the answer of Salter, dictated by the said Schaffer (who, Salter says, employed counsel and is "managing this whole business," p. 32, supplemental brief), in which the prayer is made that this suit shall be *dismissed* unless the Court shall decree that *all* the second mortgage stock shall be sold and proceeds applied to *all* of the holders of the said stock. Page 41, supplemental brief.

The complainant and its allies simply contend that the motive is immaterial and that the case is governed by decisions of this Court, such as *McDonald vs. Smalley,* 1 Peters, 620; *Barney vs. Baltimore,* 6 Wall., 280, and the like. We insist that cases of this character are not at all in point, as they are based upon the

law and statutes governing transfers as affecting the jurisdiction of the several Circuit Courts of the Union. Furthermore, *they relate entirely to claims which might have been sued upon by the assignor,* whereas in the present case the claim of complainant could not have been sued upon by the assignors in any judicial tribunal whatever. It was without remedy when it was assigned, and falls within that class of cases like *United States vs. Buford,* 3 Peters, 12 (see original brief, p. 36), in which it was held that an assignment to a sovereignty like the United States or a State could not confer or revive a remedy which had ceased to exist under the State law. In the present case no remedy ever existed.

The law governing this case is higher and broader than decisions based upon statutes relating to the jurisdiction of Circuit Courts. The principles to be applied grow out of great and fundamental provisions of the Constitution, which this Court will see are not contravened or evaded. Nothing of a narrow, technical character will dim its vision in the discharge of this grave duty.

Cases, then, of the character mentioned can only be used by way of analogy; *but, tested by these cases alone, we confidently contend that this suit cannot be maintained by the complainant.* The cases above mentioned and similar ones have been virtually overruled in so far as they declare that a valid legal transfer of a claim precludes any inquiry into the motive of the transfer. They are reviewed in *Lehigh M. & M. Co. vs. Kelly,* 160 U. S., 349. The majority holding, says Rose's Notes (6 Vol., p.

291-2), that "jurisdiction is defeated where motive was fraudulent." If this were not so, it would be difficult to account for decisions in Kelly's case, just cited; *Little vs. Giles,* 118 U. S., 596; *Farmington vs. Pillsbury,* 114 U. S., 138, and several other cases in which the legal title had passed to the assignee, and for aught that appears was to remain in him, he only agreeing to pay to assignor one-fourth of the recovery in one case and one-half in the other. The Court broke away from the strict technical ground taken in *McDonald vs. Smalley* and similar cases and took a broader view in order to shut down the gates and keep back the flood of fraudulent devices and contrivances by which frauds were attempted upon the jurisdiction.

And so, when it can be seen that where parties are collusively joined or arranged, or assignments are made for the purpose of "creating a case" for removal or jurisdiction, the Court will look into all the circumstances, including the *motive,* and see whether there is an attempted fraud upon the jurisdiction. On the other hand, it is contended that, notwithstanding these rulings, the Court still adheres to the rule as laid down in the Barney and Smalley cases, *supra.* The rule, however, has been more recently stated by Chief Justice Fuller in delivering the opinion of the Court in *Oneal vs. Crawford,* 144 U. S., 585.

> "But if the transfers were absolute and the judgment creditors *parted with all their interest for good consideration,* then the mere fact that one of the motives of the purchase may have been to enable the purchaser to bring suit in the United States Court would not be sufficient to defeat the jurisdiction."

(The italics are ours, though in Kelly's case, *supra,* and many others the Court very frequently italicizes "valuable consideration" in discussing this subject.)

Granting that this last mentioned rule is still in unqualified existence, it in nowise conflicts with the contention we are making. *Indeed, it fully sustains our position,* because in our case the assignors have not *"parted with all their interest,"* nor was there any *"good consideration."* The rule as stated by the Chief Justice is fully sustained by the cases cited in the opinion and others to which we will refer. It is to be noted that the citation of authorities upon this point by the Court includes the cases of *McDonald vs. Smalley, supra; Barney vs. Baltimore, supra; Williams vs. Nottawa,* 104 U. S., 209, which are cited and relied upon in the complainant's brief. It is therefore very clear that the qualifying words we have italicized were by no means considered inconsistent with these cases, and if inconsistent must be considered to that extent modified or overruled.

It is also to be noted that in these cases the entire interest was really or apparently assigned, leaving nothing in the assignor *which could possibly benefit him.* The simplicity of those days seemed unequal to the task of inventing an ingenious scheme like the present, by which the assignor could, by assignment of a part of his claims, obtain a footing in Court for the enforcement of the remainder, which remainder could not otherwise have been sued upon in any court.

As an illustration of the general principle as declared in *Crawford vs. Oneal,* we refer to *Little vs. Giles, supra,* in which it is said:

"Of course, where the interest of the nominal party is real, the fact that others are interested who are not necessary parties, and are not made parties, will not affect the jurisdiction of the Court; but when it is simulated and collusive and created for the very purpose of giving jurisdiction, the courts should not hesitate to apply the wholesome provisions of the law."

These words are directly applicable to our case. They furnish a key to the true solution of questions of this kind. It is thus declared that the motive is only immaterial where the transaction is real and the transfer *does not* affect the jurisdictional relation of others who are interested and are necessary parties. In our case the holders of the remaining second mortgage bonds, as well as the holders of the first mortgage bonds, *are necessary parties and have been made parties by the complainant,* and this relation with the complainant was created by the assignor, Schaffer (who, together with his firm, owned or controlled substantially all of the remaining second mortgage bonds), "for the very purpose of giving jurisdiction, so that in the guise of necessary party defendants they could, as substantial plaintiffs, obtain jurisdiction against a State.

The case of *Ramsey vs. Gould,* 57 Barb., 398, cited in complainant's brief, if applicable to this case at all, is clearly authority for us. The plaintiff was a creditor or stockholder. He had a right to relief although his motives in purchasing and suing was to gratify his malice by calling the officers to account.

The Court said:

"The relative rights of the parties are the same as if the suit were brought by the plaintiff's vendor. The intent with which he purchased does not change or

> *affect those rights or raise any equities respecting them in favor of the defendants.* * * * I do not see that the equity rule has any application here. That has reference to the relation of the parties in respect to the matter in controversy. If there is any abuse of that relation by the plaintiff he does not come with clean hands to enforce an advantage just obtained."

While this and other New York cases have nothing to do with questions of Federal jurisdiction, we have extracted the above as in line with the principle laid down in Giles' case.

The other New York cases cited in complainant's brief are also inapplicable. The fact that the plaintiff in *Rice vs. Rockfelder,* 134, N. Y., 185, was a competitor in the business did not prevent him from purchasing the stock. So, exercising a *legal* right to dig a ditch (as in *Phelps vs. Newlin,* 72 N. Y., 39) is not actionable when it violates no *legal* rights of another, although the motives are bad.

An examination will disclose that the above cases are a fair type of the New York decisions cited by complainant on the question of motive.

The principles we are contending for are sustained in *Farmington vs. Pillsbury,* 114 U. S., 138, in which Giles' case is approved, and in *Lake County vs. Dudley,* 173 U. S., 253, in which these cases are fully approved.

The following extract from the Farmington case well illustrates the spirit in which the Court administers the rule:

> "This suit, begun July 1, 1880, in the name of the plaintiff, is the result of that arrangement. It is a suit for the benefit of the owners of the bonds. They are to receive from the plaintiff one-half of the net pro-

ceeds of the case they have created by their transfer of the coupons for that purpose. The suit is their own in reality, though they have agreed that the plaintiff may retain one-half of what he collects for the use of his name and his trouble in collecting. *It is true the transaction is called a purchase in the papers that were executed,* and that the plaintiff gave his note for $500, but the time for payment was put off for two years, when it was, no doubt, supposed the result of the suit would be known. *No money was paid,* and as the note was not negotiable, it is clear the parties intended to keep the control of the whole matter in their own hands. So that if the plaintiff failed to recover he could be released from his promise to pay. In the language of Mr. Justice Field, speaking for the Court, in *Detroit vs. Dean,* 106 U. S., 537, applied to the facts of this case, the transfer of the coupons was *a mere contrivance, a pretense,* the result of a collusive arrangement to create in favor of this plaintiff a fictitious ground of Federal jurisdiction, so as to get a re-examination in that jurisdiction of the question decided adversely to the owners of the coupons by the highest judicial tribunal of the State.

Hawes vs. Oakland, 104 U. S., 450.
Hayden vs. Manning, 106 U. S., 586.
Bernard vs. Stebbins, 109 U. S., 341."

The principles deducible from the decisions of this Court forbid the assignment of a legal title as a part of a scheme, "contrivance" or "device" whereby the assignors can substantially sue a State, especially where the assignee pays no consideration, and, besides, must from the testimony, have had knowledge of the motive and lent itself as an instrumentality in the carrying out of such unlawful contrivance.

They forbid that an assignment shall be made in such manner *as to affect the jurisdictional relations of the assignors,* so as to enable them to acquire a standing in court as substantial plaintiffs and thus evade the provisions of the Eleventh Amendment.

They forbid that the assignors should *create* a kind of tenancy in common in the security, so that the new tenant, alone being able to sue, can draw into the jurisdiction the claims of the assignors upon which they cannot sue.

They forbid any such manipulation of these few bonds, and the Court will, we trust, look into the whole matter and the unlawful purpose to be accomplished by the assignment.

They forbid any such manipulation of these few bonds, and the Court will, we trust, look into the whole matter and the unlawful purpose to be accomplished by the assignment.

"No doubt if from any source the Court is led to suspect that its jurisdiction has been imposed upon by the collusion of the parties or in any other way, it may at once, of its own motion, inquire," etc.

Hartzog vs. Memory, 116 U. S., 588.
Cross vs. Allen, 141 U. S., 532.

A notable instance of a court declaring that the law is not to be evaded by apparently legal arrangement is

United States vs. Northern Securities Co., 120 Fed., 721.

These principles require that the motives must be looked into under the facts of this case.

It would seem quite clear that these bondholders have no mortgage as contemplated by the statute. No deed was made

as required by the law, and so far from any particular ten shares of stock being described, no certificates of stock were even issued. The holders, therefore, have, at most, an agreement to make a mortgage, or an equitable lien, and to the extent of ten shares each out of this mass of stock. In other words, if they have any lien of any kind, which we deny, it is *in solido.* See general brief, pp. 71-74, and authorities. See also Cook on Corporations, 469.

The distinguished counsel for complainant, in his oral argument, seeing that there was no mortgage as required by law, argued strenuously that the holders were tenants in common, or the like, in all of this class of stock. The other holders, therefore, are necessary parties on *this* as well as on the other grounds mentioned in general brief (49), which grounds are in themselves conclusive. Being in the nature of tenants in common in this stock (or "*quasi* tenants in common." Short's Railway Bonds and Mortgages, p. 46), with the complainant, it is manifest that the assignment is not clear and absolute. It is manifest that the assignors still have an interest in the common security, and it extends to *every part of this* mass of stock.

> "Where an assignment is not absolute, and the assignor retains an interest in the security, he is a necessary party, because he is interested, and particularly in taking an account of what is due on it."
>
> *Miller vs. Henderson,* 2 Stockton (N. J.), 320.

Can it be said that the assignors have reserved no interest *when by reason of this very interest they are necessary parties?*

Can it really be that by reason of the very interest they still have in this common security, they are to be permitted to enforce the collection of their bonds as substantial plaintiffs, and at the same time *it is to be declared that they made a clean, absolute conveyance to complainant, reserving no interest or benefit to themselves?*

If such a scheme as this can succeed, it would be difficult to conceive of a proper definition of a "device" or "contrivance" by which parties are collusively joined and arranged, or assignments made for the purpose of perpetrating frauds upon the jurisdiction.

This case as presented in the record, therefore, offends two rules where the motive is for the purpose of creating a case of jurisdiction:

First. That the assignment did not take out of the assignor his title as tenant in common in the common security.

Second. That the assignors are not only upon this but upon other grounds necessary parties, *and the jurisdictional relation is sought to be changed by the voluntary assignment.*

This, then, being a case in which the motive of the assignment may be inquired into, and the admissions and uncontradicted testimony plainly showing that this voluntary assignment was a part of a scheme or contrivance to evade a great constitutional provision, and that the assignment was made for such fraudulent purpose, we submit that upon this ground alone the complainants' bill should be dismissed.

Note to page 49.

General Brief as to Doctrine of Cal. vs. So. Pacific Co.

By reference to the above page of the general brief the Court will see that the second mortgage bondholders are necessary parties upon other grounds than those discussed in the preceding note. We respectfully ask that these last-mentioned grounds be also considered on the subject in connection with those mentioned on said page 49.

Note to page 48, original brief.

Re-arrangement of Parties.

"A Federal Court is without jurisdiction of a suit for specific performance of a contract in which the complainant owns only a part interest, where the owner of the remaining interest, who is joined as a defendant, is a citizen of the same State as his co-defendants, the other parties to the contract. In such case he must be arranged by the Court on the side of the complainant in the controversy."

Joseph Dry Goods Co. vs. Hecht, 120 Fed., 761.

"A Federal Court is without jurisdiction of a suit by a legatee under a will against the executor and other legatees who are citizens of the same State, where it appears from the bill that the interests of such other legatees in the matter in controversy are identical with those of plaintiff, and they are made defendants only on an allegation that they refuse to join as plaintiffs."

Johnson vs. Ford, 109 Fed., 501.

Note to page 36 et seq., general brief.

Assignee cannot acquire greater rights than assignor.

Green vs. Early, 39 Md., 223: "Where an assignee takes an assignment with knowledge that his assignor bore a particular relation to the party from whom he acquired his title to the subject-matter assigned, if the title should be impeached by reason of such relation the assignee is required to defend the assignment as if he himself stood in such relation."

Hill vs. McPherson, 15 Mo., 147: "If a firm executes a note to one of its members he cannot sue on it at law, nor can his assignee. The assignment cannot create a right to sue when the assignor has not such right."

"We cannot see how the assignor, who could not sue himself, can give by his assignment power to the assignee to sue."

Security Trust Co. vs. Black River Nat. Bank, 187 U. S., 211. Where claim against administrator is barred by State law a suit in Federal Court by non-resident will not be sustained.

Cites *Yondley vs. Lavender,* 21 Wall., 276.

After stating that the several States have full control over estates of deceased persons and their laws will be followed, the Court says:

"Besides this, it would give to the contract of a foreign creditor made in Arkansas a wider scope than a similar contract made in the same State by the same debtor with a home creditor. * * * Such a difference is manifestly unjust and cannot be supported."

In Lavender's case, in citing *Payne vs. Hook,* 7 Wall., 429, the Court, in granting relief in equity, said:

"No greater rights in the estate were adjudged to her than were secured by the law of the State."

In *Hawn vs. Trainer*, 109 Pa. St., 1, it was held that a wife could not, after maturity, assign a note payable to her by her husband so as to enable the assignee to sue upon it. The affidavit for defense also sets up the defense that the assignment was not for value, but a mere device. The Court said:

"If the latter point is made the jury should be required to find specially and separately upon it, because there would then arise another question, whether during marriage and cohabitation a wife can transfer, even for value, a note of her husband as to which her own right of action was suspended by the marriage, so as to enable the indorsee to sue her husband. If so, she can at will nullify that provision of the statute (that is, a wife may not sue a husband except in case of divorce, etc.). This is an important general question which was suggested but not argued in the case, and therefore we express no opinion upon it."

Following the line of Hawn's case:

See *Bullard vs. Kenney*, 10 Cal., 63, where assignee of a partner's claim against partnership could not recover, such remedy not contemplated by parties to the transaction.

See *Brooks vs. Record*, 47 Ill., 30, where it is said the assignee can take no higher or better title than the assignor. In this case the assignor had lost his remedy by *laches*.

"The laws which exist at the time and place of the making of the contract and where it is to be performed enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge and enforcement."

Walker vs. Whitehead, 16 Wall., 314.

"It is also settled doctrine of this Court that the laws which subsist at the time and place of making a contract enter into and form part of it, as if they were expressly referred to or incorporated in its terms."

Edwards vs. Kearsey, 96 U. S., 601.

Let the doctrine declared by Hamilton and others and approved by this Court in *Haus vs. Louisiana*, 134 U. S., 1; *Arkansas vs. Washington*, 21 How., 530, and many other cases—that "those who deal in the bonds and obligations of a sovereign State * * * must rely altogether on the sense of justice and good faith of the State"—be read into these bonds, and it must follow that an assignment to another State cannot in this way deprive the debtor State of such a vital element of sovereignty.

See also *Smith vs. Reeves*, 178 U. S., 446.

States are political bodies, and it was not contemplated that they should deal in the bonds of a sister State. Taking these bonds under the circumstances, it can hardly be said that the claimant acquired them in "due course."

Furthermore, so far as the transfer is tainted with a fraudulent purpose to evade the Eleventh Amendment, the claimant cannot in any view invoke the ordinary rule of commercial law as to the good faith of an antecedent holder. *The fraud here was not perpetrated or attempted to be perpetrated by an antecedent holder, but between the immediate assignors* and the complainant assignee. The testimony shows that she must have

known of this fraudulent purpose. Even if she did not, she is a volunteer and is affected with knowledge of it.

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